Petition

81-1580

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Case No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NICK SANBORN, et al.,

Petitioners,

v.

DENNIS M. WOLFEL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER A CIVIL RIGHTS PLAINTIFF HAS THE BURDEN OF SHOWING THAT A PUBLIC OFFICER, WHO ACTS IN CONFORMITY WITH HIS DEPARTMENTAL POLICY, HAD AN IMPROPER MOTIVATION.

II. WHETHER IN THE ABSENCE OF A SHOWING OF MALICE OR SOME PURPOSE UNRELATED TO THE PERFORMANCE OF HIS DUTIES, A PUBLIC OFFICER WHO ACTS IN RELIANCE UPON HIS DEPARTMENTAL POLICY, WHICH IS NOT UNREASONABLE ON ITS FACE, IS IMMUNE FROM LIABILITY FOR DAMAGES.

III. WHETHER A CIVIL RIGHTS PLAINTIFF IS ENTITLED TO COMPENSATORY DAMAGES FOR HIS CONFINEMENT WHERE THE RECORD SHOWS THAT HE WOULD HAVE BEEN CONFINED FOR AN EVEN LONGER PERIOD IF HE HAD NOT BEEN DEPRIVED OF HIS ALLEGED CONSTITUTIONAL RIGHT.

PARTIES

Petitioners:

Nick Sanborn
John D. Barkeloo

Respondent:

Dennis M. Wolfel

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. A previous opinion of that court in this case is reported as 555 F.2d 583. That opinion and the opinions of the District Court in this case also appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 18, 1981. A petition for rehearing was granted in part, to delete one sentence from the majority opinion, and denied in all other respects on January 14, 1982. This petition for certiorari was filed within 90 days of the date of judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Case No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NICK SANBORN, et al.,

Petitioners,

v.

DENNIS M. WOLFEL,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Nick Sanborn and John D. Barkeloo respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 18, 1981.

STATEMENT OF THE CASE

On March 15, 1973 the respondent Dennis M. Wolfel was placed on parole. Shortly thereafter petitioner Barkeloo was assigned as his supervising parole officer. At the time petitioner Barkeloo was supervising parole officer for approximately sixty persons.

On May 27, 1973 respondent was arrested by the Columbus police on a charge of intoxication. He had been in the Tip Top Club, a bar in Columbus, Ohio. During the late evening and early morning hours, he made several trips next door to the D & M Sub Shop, where he became involved in an argument with its owner, Gladys Marie Kuhn. She called the police and told them that respondent had come into her place of business and threatened her with a firearm.

When the police arrived respondent was in the Tip Top Club. The police searched respondent and the bar but were unable to find the firearm. After his arrest respondent was taken to jail where he posted bond and was released. He forfeited his bond when he failed to appear at his hearing in the Franklin County Municipal Court, scheduled for May 29, 1973.

On May 28, 1973 the Columbus police again arrested the respondent on charges of trespassing and telephone harassment. Ms. Kuhn told the police that a person whom she believed to be the respondent had threatened her life over the telephone. He had said that he was coming to get her and that her time was short.

On May 29, 1973 Ms. Kuhn telephoned petitioner Barkeloo and told him that respondent had threatened her with a firearm. He asked her to come to his office and make a statement to that effect. Ms. Kuhn did come to the office and her statement was transcribed by a stenographer. She did not sign it, however. She said that because of the telephone threat she was afraid of what the respondent would do to her if he found out what she had done.

Petitioner Barkeloo discussed the matter with his supervisor. They decided to question respondent about the incident. The following day, May 30, 1973, he and another parole officer went to respondent's home and

asked him to come to the office for an interview. At the office respondent admitted that he had been in Ms. Kuhn's shop on the night in question but denied having a firearm. Because of the seriousness of the charge, petitioners decided to place respondent in custody and to conduct a further investigation. Petitioner Barkeloo, therefore, arrested the respondent for parole violation on charges of having a firearm and forfeiting bond on his intoxication charge. Both lower courts found that the arrest was valid.

During the course of the investigation, petitioner Barkeloo visited the respondent at the jail three or four times to see if he remembered anything which might be helpful. At first respondent stated that he would be able to clear himself if he were permitted to take a polygraph test. Petitioner Barkeloo scheduled such an examination to be administered by the state highway patrol. Before the examination was given, however, respondent indicated that he had changed his mind and did not wish to take it.

Ms. Kuhn had told petitioner Barkeloo that the bartender at the Tip Top Club had seen respondent with a pistol on the night he was arrested. When petitioner interviewed the bartender, however, he said he didn't wish to comment on the matter.

After petitioner Barkeloo was unable to find anyone who would corroborate her story, he telephoned Ms. Kuhn to tell her that if she did not sign her statement it would not be sufficient to declare him in violation of his parole. Ms. Kuhn told petitioner that she would come to his office to sign her statement on Friday, June 15, 1973.

Ms. Kuhn did not sign the statement on that day. She did sign a statement on July 19, 1973 which contained the same basic facts and testified to that effect at an on-site hearing. At that hearing there was finding of probable cause that respondent had violated his parole by having a

firearm and making threats. The hearing officer, however, failed to notify the respondent of his findings at the conclusion of the hearing. Because of this respondent was released from custody.

When Ms. Kuhn did not come into his office on June 15, 1973, petitioner Barkeloo filed his parole violation report recommending that respondent be released from custody and restored to parole. This was only twelve working days from the date of his arrest. On the following working day, Monday, June 18, 1973, petitioner Sanborn concurred in the recommendation and forwarded it to his superiors in the case review section.

Petitioners had no authority to proceed further until case review had acted on their recommendation. On June 26, 1973 case review instructed petitioners to release the respondent. Petitioners released their detainer on the plaintiff the same day.

No on-site hearing was scheduled for respondent during the time he was incarcerated from May 30, 1973 to June 26, 1973. It was the policy of the department at that time to consider a bond forfeiture on a criminal charge as prima facie evidence of a parole violation which eliminated the need for an on-site hearing. Since respondent had forfeited bond on a charge of intoxication, it was believed that an on-site hearing was not needed.

Petitioners had no authority to schedule an on-site hearing.[1] That could only be done by the case review

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[1]The suggestion in the majority opinion that there is nothing in the record to show this lack of authority is incorrect. Petitioner Sanborn so testified on cross examination. App. at 95. Both he and the deputy superintendent of the Department at that time testified that the decision to schedule such a hearing was made by his

section. Under the procedure in effect at that time, the parole officer was to submit his parole violation report to the case review section within ten working days of the arrest. The case review section would then determine whether an on-site hearing should be held.

If it was determined that an on-site hearing should be held, either a regional supervisor or a unit supervisor designated by him would be assigned as hearing officer. The hearing officer would give the parolee written notice of the charges and the time, place and purpose of the hearing; explain his rights at the hearing; and give him the opportunity to waive the hearing if he so desires.

If the parolee did not waive, the hearing would be scheduled within two weeks of the submission of the parole violation report. Following the hearing, the hearing officer has five days to submit his report to the Superintendent of Parole stating his decision, the reason therefor and the evidence relied upon. App. at 90-93.

Because of the departmental policy petitioners did not recommend that an on-site hearing be scheduled for respondent. They did, however, request their superiors to have the policy reviewed by the legal representative for the department, the Ohio Attorney General. The Attorney General did review the policy and found it permissible.

Respondent instituted suit, on March 15, 1974, in the United States District Court for the Southern District of

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superiors. In addition Bulletin 13 which was introduced as defendants Exhibit C (App. at 90-94) makes it clear that neither the parole officer nor his supervisor has the authority to schedule a hearing. Those officers plus the regional supervisor are to be notified if such a hearing is to be held.

Ohio, Eastern Division, claiming that petitioners had violated his rights by arresting him, searching his house and incarcerating him for 27 days without affording him an on-site hearing. The court directed a verdict for the petitioners on the issues of the arrest and the search. The court submitted the issue of the on-site hearing to the jury and refused to give the instruction on qualified immunity requested by petitioners. The jury returned a verdict in favor of the respondent and awarded him damages of $1,000. The court entered judgment on the verdict on January 8, 1975. The Judgment is set forth in the Appendix at 89.

The court by Memorandum and Order filed March 18, 1975 granted petitioners' motion for a new trial. The Memorandum and Order are set forth in the Appendix at 76-78.

The court by Memorandum and Order filed July 29, 1975 vacated its previous Order and reinstated its judgment. It found that the evidence concerning petitioners' affirmative defense of qualified immunity was insufficient as a matter of law for submission to the jury. The court stated that there was no evidence that either petitioner acted out of actual malice. It found, however, that their reliance upon the departmental policy was unreasonable. This Memorandum and Order is set forth in the Appendix at 58-75.

The Court of Appeals affirmed the judgment of the lower court on the issues of the arrest and search. It reversed the judgment for damages on the issue of the on-site hearing. *Wolfel v. Sanborn*, 555 F.2d 583 (1977), App. at 37-56. It held that the District Court had erred in finding that the petitioners' reliance on the unwritten policy was unreasonable. Petitioners had satisfied the objective portion of the test. At the time in question respondent did not have a "clearly established consti-

tutional right" to an on-site hearing which could not be obviated by a bond forfeiture on a criminal charge. Since the District Court had found that petitioners used the bond forfeiture as a "pretext," the court held that the question of the petitioners' subjective good faith should be submitted to the jury.

The evidence introduced at the retrial established that it was the departmental policy at the time in question to consider a bond forfeiture on a criminal charge as prima facie evidence of a parole violation which eliminated the need for an on-site hearing; and that, at the request of petitioners, the policy was reviewed by the legal representative for the department and was found permissible. No evidence was introduced which could have shown that either petitioner acted for any reason unrelated to the performance of their duties.

The evidence also established that under the procedures in effect at the time respondent would have remained incarcerated for a longer period of time if an on-site hearing had been held.

The District Court refused to permit petitioners to attack the credibility of respondent by introducing evidence of three felony convictions.

The District Court denied petitioners' motion for a directed verdict. The jury returned a verdict for respondent and again awarded him damages of $1,000.

The District Court, on January 22, 1979, granted petitioners' motion for judgment notwithstanding the verdict since respondent had failed to file a timely response. App. 32. Judgment for the petitioners was filed the following day. App. at 31.

On October 11, 1979 the District Court granted respondent's motion to set aside that judgment and denied petitioner's motion for judgment notwithstanding the verdict and for a new trial. App. at 22-30. It set forth

testimony of the petitioners to the effect that while they used the bond forfeiture as a legal justification for holding the respondent their primary concern was the firearm charge. It found that from this testimony the jury could find that petitioners had failed to act in good faith. App. at 27-28.

The Court of Appeals, on November 18, 1981, affirmed the judgment of the District Court. App. at 8-19.

On January 14, 1982 that court granted a petition for rehearing to the limited extent of eliminating one sentence from the majority opinion. It was denied in all other respects.

REASONS FOR GRANTING THE WRIT

1. *The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Proper Burden Of Proving Subjective Good Faith.*

It is undisputed that the petitioners were acting in conformity with their departmental policy. The Court of Appeals, however, held that the District Court properly instructed the jury that petitioners had the burden of establishing their subjective good faith.

That holding is in conflict with that adopted by the Court of Appeals for the Ninth Circuit in *Milton v. Nelson*, 527 F.2d 1158 (1976). That court held that once it is established that a defendant was acting pursuant to official regulations, the burden shifts to the plaintiff to show that the defendant was not acting in good faith. *Id.* at 1160.

The holding below is also in conflict with the principles set forth by the Court of Appeals for the Fifth Circuit in

Barker v. Norman, 651 F.2d 1107 (1981). That court explained that once the defendant establishes objective circumstances which show that he reasonably believed that his conduct was in the scope of his lawful authority he has made a prima facie showing that he is entitled to official immunity. The burden then shifts to the plaintiff. With respect to the subjective portion of the immunity test, the plaintiff must introduce some objective evidence from which a reasonable person could infer that the defendant had acted out of malice rather than merely performing his duty. *Id.* at 1125-1126.

The holding below is also in conflict with the decisions of those Courts of Appeals which place the burden of proving both portions of the immunity test upon the plaintiff. *Whitley v. Siebel*, 613 F.2d 682, 685 (7th Cir. 1980); *Hanneman v. Brier*, 528 F.2d 750, 756 (7th Cir. 1976); *Goodman v. Parwatiker*, 570 F.2d 801, 805 (8th Cir. 1978); *Peacock v. Bd. of Regents*, 597 F. 2d 163 (9th Cir. 1979).

2. *The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals Concerning The Evidence Necessary To Submit The Question Of Good Faith To The Jury.*

It is undisputed that petitioners were acting in conformity with their departmental policy which was not unreasonable on its face. There was no evidence that either petitioner acted for any reason other than the performance of their duties. The testimony of petitioners, relied upon by the District Court to justify its decision, shows nothing other than the performance of such duties. Petitioners had a duty to ensure that persons who threatened the public safety not remain on parole. In carrying out that duty it is only natural that they would

be more concerned with the firearm charge than the intoxication charge. The Court of Appeals, however, held that the District Court properly denied the petitioners' motion for a directed verdict and submitted the question of their subjective good faith to the jury.

That holding is in conflict with the decision of the Court of Appeals for the Third Circuit in *Reese v. Nelson*, 598 F.2d 822 (1979). In that case, as in the instant case, the defendants were acting in reliance upon a state law which was not clearly perceived to be deficient and there was nothing in the record which established animosity or the use of their authority to inflict harm for reasons unrelated to the performance of their duties. The court held that in such a situation the case should not have been submitted to the jury. Verdicts should have been directed for the defendants. *Id.* at 827-828.

The decision below is in conflict with that of the Court of Appeals for the Fourth Circuit in *Skinner v. Spellman*, 480 F.2d 539 (1973). That court held that if a defendant was acting in reasonable good faith reliance on standard operating procedure judgment should be entered for the defendant.

The decision below is also in conflict with the principles established on this point by the Court of Appeals for the Fifth Circuit in *Barker v. Norman, supra*, 651 F.2d at 1127. That court explained that, if the plaintiff fails to establish any objective circumstances which could justify a finding that the defendant acted out of malice rather than duty, defendant is entitled to judgment as a matter of law.

The decision below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Walker v. Hoffman*, 583 F.2d 1073 (1978). That court held that where, as here, the defendants established that they had followed normal procedures and had consulted an attor-

ney, they had demonstrated both reasonable grounds for believing that their actions were lawful and that they had acted in good faith. *Id.* at 1073.

The decision below is in conflict with the statement of this Court in *Butz v. Economou*, 438 U.S. 478, 498 (1978), that where, as here, the constitutional right was not clearly established, a public official would not be held liable in the absence of some showing of malice. *See also Procunier v. Navarette*, 434 U.S. 555, 571 (1978) (Stevens, J., dissenting).

3. *The Decision Below As To Damages Is In Conflict With The Principles Established In Carey v. Piphus, 435 U.S. 247 (1978).*

The evidence established that under the procedures in effect at the time respondent would have remained incarcerated for a longer period of time if an on-site hearing had been held. The Court of Appeals, however, held that the District Court properly permitted the jury to award compensatory damages.

That holding is in conflict with the principles established in *Carey v. Piphus*, 435 U.S. 247 (1978). In that case this Court explained that the purpose of an award of damages is to compensate the plaintiff for any injury which he suffers as a result of the deprivation of a constitutional right. *Id.* at 254-256. The constitutional deprivation alleged in this case is the failure to afford respondent an on-site hearing. The injury resulting from such a deprivation would be the additional time he remained incarcerated because he was denied such a hearing.

The evidence showed that under the procedures then in effect respondent would have remained incarcerated for an additional week if an on-site hearing had been held. To permit an award of damages, other than

nominal damages, in this situation, is impermissible. Such damages constitute a windfall rather than compensation. *Carey v. Piphus, supra,* 435 U.S. at 260.

4. *The Decision Below Raises Significant And Recurring Problems Concerning The Performance Of Their Duties By Public Officers.*

Petitioners in this case have been found personally liable in damages for acting in conformity with their departmental policy, a policy which was adopted by their superiors and approved by the legal representative for their department.

This Court has explained that the doctrine of immunity for public officers is based in part upon the public interest in permitting such officers to perform their official responsibilities according to their own convictions and judgment without being deterred or intimidated by the threat of personal liability or vexatious litigation. It is also based upon the recognition of the injustice of placing the officer in a position where he is required by law to make decisions and then subjecting him to liability if a jury, with the benefit of hindsight, disagrees with such decisions. *Scheuer v. Rhodes,* 416 U.S. 232, 239-240 (1974); *see also* Restatement 2d *Torts,* 412, § 985(D)(b).

Both of these policy considerations would be seriously impaired if the decision below is permitted to stand. Any course of action which a parole officer takes may injure someone. If he arrests and incarcerates a suspected parole violator, he may violate the parolee's rights. If he fails to do so, he may neglect the interests of the victim or of society generally. If this decision is permitted to stand, parole officers in the Sixth Circuit may at least subconsciously, tend to neglect the interests of the victim or society since that course of action would create less risk of personal liability.

The decision below is particularly unfair to parole officers and other low level public officers. Such officers are more likely to be sued than their superiors. Their interaction with potential plaintiffs is greater; they are less able to fashion their conduct in a way to avoid liability, if they refrain from acting they may neglect the interests of the victim or of society generally; and the results of their actions are more likely to have results similar to common law torts, such as false arrest or false imprisonment, which are more likely to generate a suit.

Under the decision below, however, such officers are entitled to substantially less protection than their superiors. The majority states that a higher level official may establish his immunity by showing that he acted within the scope of his authority. If the plaintiff fails to show that he did not act in good faith, the official is entitled to judgment. App. at 10.

It is not enough, however, for lower level officials to show that they were acting within the scope of their authority; that they were following the policy which had been adopted by their superiors; and that they had no reason to question the validity of that policy. The question of their liability is one for the jury.

Under the reasoning of the majority below, the court would likely have found their superiors immune from liability for adopting the policy. Petitioners, however, were found liable for following that policy in accordance with instructions of those superiors. Petitioners submit that the unjustice of such a situation is obvious.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for Writ of Certiorati was sent this 22nd day of February 1982 by United States first class mail postage prepaid, to Michael E. Geltner, Geltner & Ritchie, Number Ten E Street, S.E., Washington, D.C. 20003, Attorney for Respondent.

THOMAS V. MARTIN
Attorney for Petitioners

Appendix

Case No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NICK SANBORN, et al.,

Petitioners,

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ON WRIT OF CERTIORARI TO
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APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 8, 1975 - Judgment of the United States District Court, Southern District of Ohio, Eastern Division awarding plaintiff judgment of the sum of $1,000 plus interest and costs.

March 18, 1975 - Memorandum and Order setting aside judgment filed January 8, 1975 and scheduling matter for trial.

July 29, 1975 - Memorandum and Order denying defendants' motion for summary judgment, vacating order filed March 15, 1975 and reinstating judgment of $1,000 against defendants.

July 30, 1975 - Judgment of the United States District Court, Southern District of Ohio, Eastern Division denying motion of defendants for summary judgment, vacating order filed March 18, 1975 and reinstating judgment of $1,000 against defendants.

May 2, 1977 - Decision of the United States Court of Appeals for the Sixth Circuit.

July 14, 1978 - Memorandum and Order denying defendants' motion for summary judgment.

October 26, 1978 - Judgment of the United States District Court, Southern District of Ohio, Eastern Division granting motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

January 23, 1979 - Judgment of the United States District Court, Southern District of Ohio, Eastern Division setting aside judgment entered on October 26, 1978 and entering judgment for defendants.

October 11, 1979 - Memorandum and Order denying defendants' motions for JNOV and for new trial.

October 25, 1979 - Judgment of United States District Court, Southern District of Ohio, Eastern Division

granting plaintiff's motion to set aside the judgment notwithstanding the verdict and denying defendants' motions for JNOV and for new trial.

November 18, 1981 - Decision of the United States Court of Appeals for the Sixth Circuit.

January 14, 1982 - Order denying petition for rehearing filed in the United States Court of Appeals for the Sixth Circuit.

A-6

No. 80-3012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS WOLFEL,
Plaintiff-Appellee,

vs.

NICK SANBORN, et. al.,
Defendants-Appellees
(sic)

ORDER

Before EDWARDS, Chief Judge, WEICK, *Circuit Judge, and PHILLIPS, Senior Circuit Judge.

A majority of the judges of this court in regular active service having not voted for rehearing en banc, the petition for rehearing has been referred to the hearing panel.

Upon consideration, it is ORDERED that the petition for rehearing is granted for the limited purpose of striking from pages four and five of the majority opinion the following language:

> If the parole officers lacked authority to conduct such a hearing, they assuredly had an obligation to recommend to their superiors compliance with the decision of the Supreme Court in *Morrissey*.

Accordingly, the majority opinion is amended by striking therefrom the above quoted language.

---

*Judge Weick became a Senior Judge on December 31, 1982 (sic).

In all other respects the petition for rehearing is denied.

Judge Weick dissents. He would grant the petition for rehearing and reverse the judgment of the district court for the reasons stated in his dissenting opinion of November 18, 1981.

Entered by order of the court.

CLERK

No. 80-3012

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DENNIS WOLFEL,

Plaintiff-Appellee,

v.

NICK SANBORN, ET AL.,

Defendants-Appellants.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed November 18, 1981.

Before EDWARDS, Chief Judge, WEICK, Circuit Judge, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge, delivered the opinion of the Court, in which EDWARDS, Chief Judge, joined. WEICK, Circuit Judge (pp. 5-12) filed a separate dissenting opinion.

PHILLIPS, Senior Circuit Judge. This is an action by a parolee against two state parole officers for arresting and imprisoning him for twenty-seven days, at which time he was released, without holding a preliminary hearing to determine probable cause as required by *Morrissey* v. *Brewer*, 408 U.S. 471, 485 (1972). The parolee, Dennis Wolfel, filed this action pursuant to 42 U.S.C. § 1983 against Ohio Adult Parole Authority Supervisor Nick Sanborn and Parole Officer John Barkeloo. Wolfel alleged that the two parole officers violated his *Morrissey* right to a preliminary hearing. For a recitation of the pertinent facts see the opinion of this court in the

former appeal, *Wolfel* v. *Sanborn*, 555 F.2d 586 (6th Cir. 1977).

Following the first trial of Wolfel's claim, the jury awarded him $1,000. On appeal we reversed and remanded to the district court, holding that the two parole officers were entitled to have their defense of good faith submitted to a jury. The district judge conducted a second trial in accordance with the mandate of this court. A jury again awarded Wolfel $1,000 and the two parole officers again have appealed. We affirm.

Supervisor Sanborn and Officer Barkeloo contend: (1) The district court committed reversible error by instructing the jury that it was the parole officers' burden to prove that they acted in good faith; and (2) the district court should have granted their motion for a directed verdict on the ground that there was insufficient evidence from which the jury could find that they acted in other than subjective good faith.

In *Wood* v. *Strickland*, 420 U.S. 308, 318 (1975), the Supreme Court wrote:

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with a good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974).

Justice Rhenquist joined the opinion of the Court in *Gomez* v. *Toledo*, 446 U.S. 635, 642 (1980), reading it as leaving "open the issue of the burden of persuasion, as opposed to the burden of pleading, with respect to a defense of qualified immunity." We find no decision of the Supreme Court explicitly allocating the burden of proving the qualified immunity defense.

We conclude that the district court correctly instructed the

jury that it was the burden of the two parole officers to prove their defense of qualified immunity.

The nature of the qualified immunity defense supports the allocation to defendants of the burden of proving that defense. In *Gomez* the Supreme Court allocated the burden of pleading the qualified immunity defense to defendants, reasoning:

> Our conclusion as to the allocation of the burden of pleading is supported by the nature of the qualified immunity defense. As our decisions make clear, whether such immunity has been established depends on facts peculiarly within the knowledge and control of the defendant. . . . The existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know. *Id.* at 640-41.

This court's opinion in *Kareem Abdul Jihaad* v. *O'Brien*, 645 F.2d 556 (6th Cir. 1981), does not require a contrary result. In *Jihaad*, we held:

> The defendants pled official immunity as an affirmative defense. It was not contested that O'Brien was acting within the scope of his discretionary authority in conducting the hearing. This was sufficient to establish a prima facie case of entitlement. The burden of proving that O'Brien was not entitled to official immunity was then on the plaintiff. The plaintiff failed to show that the defendant was not entitled to immunity under one of the tests set forth in *Wood*. *See Douthit* v. *Jones*, 619 F.2d 527, 534 (5th Cir. 1980). The defendant O'Brien was entitled to judgment under the doctrine of qualified official immunity. *Id.* at 564.

In *Douthit* v. *Jones*, 619 F.2d 527, 534 (5th Cir. 1980), the Fifth Circuit held:

> When a plaintiff seeks damages under § 1983 for a discretionary action by an official such as a prison ad-

> ministrator, who must exercise an exceedingly broad range of discretion in performing his official duties, the official should be entitled to qualified immunity upon a showing that he acted within the scope of his discretionary authority. The burden would then be upon the plaintiff to show either that a subjective, bad faith intent to harm him motivated the official or that the official knew or should have known that his action infringed a clearly established constitutional right of the plaintiff. An official such as a police officer, whose discretion is limited, however, must demonstrate that he acted with a good faith belief that his actions were within his lawful authority, and that reasonable grounds existed for this belief based upon objective circumstances at the time he acted.

In the present case, the two parole officers, like a policeman, exercised limited discretion. Consequently, it was their burden to prove, as the district court instructed, that they acted in good faith.

Whether this court agrees with a jury's findings of fact is not determinative of the appeal. The standard of review is whether a reasonable jury on the evidence adduced by the plaintiff and drawing all inferences in plaintiff's favor, could reasonably have found that defendants acted in other than subjective good faith. *Patzig* v. *O'Neil*, 577 F.2d 841, 848 (3d Cir. 1978). Our review of the record convinces us that the jury reasonably could find that Supervisor Sanborn and Officer Barkeloo acted in other than subjective good faith.

The parole officers contend that they had no authority to order the preliminary hearing required by *Morrissey*. We find nothing in the record to show that this issue was raised in the district court, and we, therefore, should not pass upon it on this appeal. *Bannert* v. *American Can Co.*, 525 F.2d 104, 111 (6th Cir. 1975), *cert. denied*, 426 U.S. 942 (1976). If the parole officers lacked authority to conduct such a hearing, they assuredly had an obligation to recom-

mend to their superiors compliance with the decision of the Supreme Court in *Morrissey*.

All other contentions of the parole officers have been considered and found to be without merit. The judgment of the district court is affirmed. No costs are taxed. The parties will bear their own costs in this case.

WEICK, Circuit Judge, dissenting: I respectfully dissent. This is the second time that a jury has returned an identical $1,000 verdict against State of Ohio parole officers personally, namely, in the first trial and then again in the second trial for their alleged failure to conduct an on-site parole violation hearing which they had no authority under departmental rules of the Ohio Adult Parole Authority to conduct.

On March 5, 1973, appellee Wolfel was placed on parole. He had been serving a one to fifteen year sentence for burglary in the night season when he was paroled. Barkeloo had been assigned as his parole officer. He was also parole officer for about 60 parolees. Defendant Sanborn was Barkeloo's supervisor.

On May 27, 1973, Wolfel was arrested by Columbus, Ohio, police officers on a charge of intoxication. He was taken to the city jail where he posted bond and was released. His bond was forfeited when he failed to appear at his hearing in the Municipal Court of Franklin County, Ohio, scheduled for May 29, 1973.

During the evening of May 27, when Wolfel had been drinking at the bar in the Tip Top Club in Columbus, Ohio, he made several trips to the D & M Sub Shop, where he became involved in an argument with its owner Gladys Marie Kuhn. She called the city police and reported to them that

Wolfel had threatened her with a firearm. The police arrived at the Tip Top Club and searched Wolfel and the bar but found no firearm. The police officers arrested Wolfel for intoxication.

On May 28, 1973, the Columbus police again arrested Wolfel on charges of trespassing and telephone harassment of Ms. Kuhn, who reported to the police that he threatened her life over the telephone. Wolfel told her that he was coming to get her and that her time was short. The charges were dropped some months later at the request of the city prosecutor.

On May 29, 1973, Ms. Kuhn telephoned parole officer Barkeloo and told him that Wolfel had threatened her with a firearm. He requested her to come to his office and make a statement to that effect. She came to his office that day and made a statement which was transcribed by a stenographer. She did not, however, sign the statement at that time because of the telephone threat she was afraid of what Wolfel would do to her. She did sign a complete statement at a later date on July 19, 1973.

Barkeloo discussed this matter with his supervisor Sanborn and they decided to interview Wolfel and ask him what happened. At their request, Wolfel came to their office and admitted he had been in Ms. Kuhn's shop, but denied he had a gun. Because of the seriousness of the charges, the parole officers decided to place him in custody and conduct a further investigation. Barkeloo then arrested him for parole violation on charges of having a firearm and forfeiting bond on the intoxication charge in the Franklin County, Ohio Municipal Court.

The validity of the arrest by the parole officer Barkeloo was not in issue as it was found valid by both the District Court and this court. (555 F. 2d 593).

The real question in this case is whether these two parole officers acted unreasonably and deprived Wolfel of a con-

stitutional or statutory right to an on-site hearing which is a preliminary inquiry to determine whether there is probable cause to believe that a parole violation occurred.

No proof was offered by Wolfel, who participated in the trial in the district court as his own lawyer and cross-examined witnesses, that these two parole officers had any authority to schedule an on-site hearing. The evidence offered by the defendants was that they possessed no such authority as this could be done only by the case review section of the department under the procedure then in effect. At that time, the parole officer would submit a report to the case review section within 10 working days of the arrest. The case review section would then determine whether an on-site hearing should be held and if so determined, would assign either a regional or a unit supervisor to conduct the hearing. The hearing officer would give notice of the hearing to the parolee, explain his rights at the hearing and give him the opportunity to waive the hearing if he desired. If the hearing was not waived, it was required to be held within two weeks and following the hearing, the hearing officer had five days to file his written report.

An on-site hearing would have been held on June 27, 1973, if it had been scheduled and if the hearing officer had determined there was not probable cause to believe that the parolee had not violated his parole, he would have been released sometime after July 2, 1973.

No on-site hearing, however, was scheduled on the initial arrest in the present case. It was then the policy of the department to consider a bond forfeiture on a criminal charge as *prima facie* evidence of a parole violation which would eliminate the need for an on-site hearing. It was regarded as a confession of guilt. In order to be certain that they were proceeding properly, the defendant parole officers requested their superiors to obtain clarification of this policy from the office of the departments' legal advisor, the Attorney Gen-

eral of Ohio. The superiors were advised by the office of the Attorney General of Ohio that their policy was permissible.

The fact that the parole officers were proceeding so cautiously in their handling of the case is not proof that they acted maliciously or were using this as a pretext. This case suffers from the lack of any proof of malice on the part of the two parole officer defendants in this case. At the first trial, the district court specifically found "that there was no evidence of actual malice." They were in no wise responsible for the policies of the Adult Parole Authority, but it was their duty to obey and to carry out the policies of the department. The present suit is not an action against the Authority, or the Attorney General or the State of Ohio, which is immune from liability. Hence, the case of *Morrissey* v. *Brewer*, 408 U.S. 471, 485 (1972) is inapposite as the parolee has been released. *Morrissey* was a habeas corpus case in which the parolee was not released and was denied any hearing.

During the course of the investigation, Barkeloo visited Wolfel several times at the jail to ascertain whether he remembered anything which might be helpful. Wolfel told Barkeloo that if he were permitted to take a polygraph examination, he would be able to clear himself. Barkeloo then scheduled such an examination to be administered by the State of Ohio highway patrol. Wolfel, before the examination was given, changed his mind and did not desire to take it.

Barkeloo told Ms. Kuhn that he was unable to find anyone to corroborate her story and that if she did not sign her statement, it would not be sufficient to declare Wolfel in violation of his parole. She stated that she would come to his office on June 15, 1973. When she did not come to his office on June 15, 1973, Barkeloo dictated his parole violation report recommending that Wolfel be released from custody and restored to parole. This was only twelve working days after his arrest. On the following Monday, which was the thirteenth day after his arrest, Sanborn concurred in

the recommendation and forwarded it on the same day to the case review section which instructed the parole officers on June 26, 1973, to release Wolfel which they did on the same day.

It is interesting that Wolfel was rearrested for additional threats with a gun made to other people on May 22 in a separate, different place. Ms. Kuhn testified at an on-site hearing that Wolfel had threatened her and one of her employees with a gun. The other witness to the separate incident also testified and a finding was made of probable cause that Wolfel had violated his parole by having a firearm and making threats. The hearing officer, however, failed to notify Wolfel as to his findings at the conclusion of the hearing and as a result of that technical error, Wolfel was released from custody.

The defendants endeavored to impeach the credibility of Wolfel by offering evidence of his convictions for rape, burglary and kidnapping which evidence they claimed was admissible under Rule 609 Fed. R. Evid. The district court declined to admit such evidence even to mitigate against his contention that he suffered trauma and emotional distress during his 27 day confinement. This ruling is not understandable in a case involving revocation of parole of a convicted felon.

The evidence that the parole officers acted upon the policy of the Adult Parole Authority was uncontroverted. They proffered an instruction to the jury which embodied the elements of a good faith defense under § 1983 which the trial court declined to give. It is submitted that the failure to give the requested instruction was prejudicial error. The district court also instructed the jury that the burden of proof was upon the defendants to show good faith.

The district court denied motions for a directed verdict. It granted a motion for judgment notwithstanding the verdict on the ground that plaintiff had not timely filed a memorandum and then vacated the order and denied the motion

for judgment n.o.v. It is argued that the district court erred in its denial of the motions for a directed verdict and for judgment n.o.v.

At the first trial although the district court found that there was no evidence of malice shown on the part of the defendant parole officers, it ruled that as a matter of law their affirmative defense was insufficient for submission to the jury. This in effect was a directed verdict in favor of the plaintiff on the defendants' good faith defense. On appeal to this court we stated:

> We conclude that defendants were entitled to have their good faith defense submitted to the jury and the district court erred in finding that the defendants reliance on the unwritten policy of the Parole Authority was unreasonable.

At the second trial, it was established beyond any doubt the policy of the Parole Authority at the time in question and it had been sanctioned by the Attorney General of Ohio so that there no longer existed any issue of fact on this issue. Since the parole officers had nothing to do with the establishment of the policy for the Authority, it was clearly their duty to obey it. The motions for directed verdict and for judgment notwithstanding the verdict raise this issue and it is our duty to determine it.

I.

It is submitted that this case is without precedent. Parole officers employed by the Adult Parole Authority of Ohio have in this case been held personally liable in damages for obeying a policy adopted by the Authority and approved as lawful by the Attorney General of Ohio. The policy was not to hold on-site revocation of parole hearings where the parolee had jumped bail for an offense committed while on parole.

It is not understandable why the plaintiff chose to sue the parole officers individually rather than the Parole Authority if he really believed that such a policy of the Authority deprived him of his constitutional rights. It can hardly be claimed that these parole officers owed the parolee who was on parole for burglary and had also been previously convicted of rape and kidnapping, a duty to disobey the established policy of the Authority.

In recent years, parole boards have been severely condemned for releasing on parole violent felons who have committed atrocious crimes while on parole. In the present case the parolee would even deprive parole officers of a reasonable time to investigate crimes allegedly committed by him while on parole, namely, threatening the life of a woman and her employee and another person with a firearm and jumping bail after his arrest for intoxication by police officers. In all, he was released after the lapse of only 27 days. The district judge, however, allowed 10 days of this for the on-site hearing. The trouble was the parole officers had not completed their investigation in 10 days. He was rearrested on separate charges involving another person and was given an on-site hearing. At the hearing, the hearing officer found that the plaintiff had violated his parole by making threats with a firearm. Ms. Kuhn testified at that hearing as to the parolee's threats on her life with a gun. It could be argued that because of his prior conviction for rape, Wolfel did not have much respect for women and for kidnapping that he had a propensity for violent crime. At the on-site hearing, the hearing officer neglected to advise Wolfel of his findings which violated the law and Wolfel was ordered released. He was also ordered released, as previously stated, by the case review section on recommendation of the parole officers when Ms. Kuhn had not signed the statement on June 15, 1973. It also was established by uncontroverted testimony that the defendant parole officers had no authority whatsoever to conduct an on-site hearing and therefore cannot be held in-

dividually liable for the failure or refusal of the Authority to conduct one.

In my opinion, the defendant parole officers would at least be entitled to qualified immunity. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Cf. Wood* v. *Strickland*, 420 U.S. 308 (1975); *Butz* v. *Economou*, 438 U.S. 478 (1978).

The overwhelming proof in this case established the good faith of the parole officers and the reasonableness of their conduct. As laymen, they could not possibly have had any reason to believe that the policy adopted by their employer Adult Parole Authority and approved by the highest legal officer of the State violated the constitutional rights of the plaintiff.

In view of this holding, it is not necessary to determine other important issues, namely, the burden of proof which the Supreme Court left undecided in *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980), and the admissability of impeaching evidence of Wolfel's convictions for burglary, rape and kidnapping. Additional grounds to support the direction of a verdict by the court may be urged in this court although not asserted in the district court.

The judgment of the district court should be reversed and the cause remanded with instructions to dismiss the complaint.

Case No. C-2-74-126

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DENNIS M. WOLFEL

Plaintiff

vs.

NICK SANBORN, et. at.,

Defendant

JUDGMENT
Filed October 25, 1979

This action came on for consideration before the Court, the Honorable Robert M. Duncan, United States District Judge, presiding. The issues having been considered and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED THAT: plaintiff's motion to set aside the judgment notwithstanding the verdict entered by the Court pursuant to S.D. Ohio R. 3.5.2 is GRANTED. Rule 60 (b) Fed. R. Civ. P. on the merits, defendants' motions for JNOV and for new trial are DENIED.

Dated at Columbus, Ohio, this 25 day of October, 1979.

JOHN D. LYTER, CLERK

BY:

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-74-126

DENNIS M. WOLFEL,

Plaintiff

vs.

NICK, SANBORN, et. al.,

Defendants

MEMORANDUM AND ORDER
Filed October 11, 1979

In the early morning hours of May 27, 1973, having sojourned at the D & M Subshop and the Tip Top Bar next door, Dennis M. Wolfel, a state parolee, was arrested by Columbus Police for public intoxication. The events which followed that arrest have spawned extensive litigation including two jury trials before this Court and an appeal to the United States Court of Appeals for the Sixth Circuit. With matters still apparently unresolved, the case has surfaced anew on the Court's docket.

The facts of this case are fully stated in the opinion of the Court of Appeals in *Wolfel* v. *Sanborn*, 555 F. 2d 583 (6th Cir. 1977), and will not be restated here. The present posture of the case is as follows. In accordance with the remand from the Court of Appeals, the case was again tried to a jury. On October 13, 1978, the jury returned a verdict in favor of plaintiff Wolfel and against both defendants, and awarded plaintiff damages in the amount

of One Thousand Dollars ($1,000.00). Subsequently, on November 3, 1978, defendants moved the Court for a judgment notwithstanding the verdict (JNOV), or, in the alternative, for a new trial. The plaintiff failed to respond to this motion and in accordance with S.D. Ohio R. 3.5.2. the Court granted defendants' motion and entered judgment for the defendants. The plaintiff then moved the Court, pursuant to Rule 60(b), to set aside the Court's judgment for the reason that he had never received defendants' motion. The defendants filed a memorandum contra plaintiff's motion on February 20, 1979. Plaintiff further supported his position with the aid of new counsel

on March 13, 1979, with a " Motion to Set Aside Judgment Notwithstanding Verdict and to Enter Judgment Based on Jury Verdict." This matter is now ripe for decision and will be addressed by the Court below.

Motion to Set Aside JNOV

Rule 60(b) states in pertinent part as follows:

> On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excusable neglect; [or]
>
> (6) any other reason justifying relief from the operation of the judgment.

The plaintiff, who at all times relevant to this motion has been an inmate at the Southern Ohio Correctional Facility, claims that he never received the defendants' motion

for JNOV. Plaintiff has filed an affidavit to this effect. Because this case is more than five years old, and plaintiff has aggressively pursued it for that entire time, the Court is persuaded that had plaintiff in fact received defendants' motion he would have responded. Although defendants claim that they served the plaintiff with a copy of the motion by ordinary mail, that in itself does not guarantee that plaintiff actually received the motion at the correctional facility. Accordingly, in view of all the circumstances, the Court finds that plaintiff's failure to respond to defendants' motion is the result of excusable neglect, and the Court's entry of judgment for defendants will be vacated.

Further, the Sixth Circuit has recently held that it is error for a District Judge to grant summary judgment without reviewing all materials in the file properly before it, even when the non-moving party has failed to respond to the motion. *Smith* v. *Hudson*, 600 F. 2d 60 (6th Cir. 1979). There the Court said that although summary judgment is often a useful and efficient device for deciding cases, "it must be used only with extreme caution for it operates to deny a litigant his day in court." 600 F. 2d at 63.

The Court of Appeals concluded:

> Thus even though the plaintiffs offered no timely response to the defendants' motion for summary judgment, the District Court could not use that as a reason for granting summary judgment without first examining all the materials properly before it under Rule 56(c).

Id. at 65. Similar reasoning applies in the present case where the application of S.D. Ohio R. 3.5.2, which in effect grants the defendants' motion for JNOV without

a review of all the materials before the Court, works to rescind the day in court which plaintiff has already had.

Motion for JNOV or New Trial

The Court having granted plaintiff relief from its order of January 22, 1979, it will now consider the merits of the defendants' motion for JNOV or new trial.

The basis for the motion for JNOV is defendants' claim that there was no evidence introduced at trial that could justify a reasonable jury in concluding that the defendants acted otherwise than in conformity with their unwritten departmental policy position that an on-site hearing was not required in a bond forfeiture case. Therefore, defendants claim that they are entitled to a qualified good faith immunity from liability.

The Sixth Circuit spoke specifically to the topic of good faith immunity in its opinion on appeal of the first trial of this matter. Indeed, the Court of Appeals remanded the case for a new trial so that the question of good faith immunity could be decided by the jury. The appeals court held that the two-prong test for qualified immunity articulated by the Supreme Court in such cases as *Butz* v. *Economou*, 438 U.S. 478 (1978), *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) and *Wood* v. *Strickland*, 420 U.S. 308 (1975) applied in the present case involving state parole officers. Setting forth the test applicable in this case, the Court of Appeals stated as follows (555 F. 2d at 592):

> The first question is whether the defendants were acting "sincerely and with a belief that [they were] doing right . . ." when they determined that plaintiff was not entitled to an on-site hearing. *Wood, supra*, 420 U.S. at 321. The

district court stated in its memorandum of July 29, 1975, that "There is no evidence that the defendants acted out of actual malice." The court went on to find, however, that ". . .[T]he defendants seized upon a legal pretext as a means of keeping Wolfel in custody while more evidence could be sought. He was held not for possessing a weapon, according to defendants, but for intoxication." The district court did not consider this "pretext" to be *per se* constitutionally impermissible, but the court found that reliance on such a devise by law enforcement officials was subject to "careful scrutiny" where good faith was at issue.

We agree with the district court that the evidence the defendants used the bond forfeiture as a pretext for holding plaintiff without a preliminary Morrissey hearing raises a question regarding their claims of subjective good faith. We believe, however, that the determination of good or bad faith in the minds of the defendants (to the extent this can be determined) *was a matter for the jury to determine in the first instance.* The district court refused the defendants' requested instructions on this matter and we hold that this was error. (Emphasis added.)

When deciding a motion for JNOV, the Court must apply the same standard used in deciding a motion for directed verdict. 9 Wright & Miller *Federal Practice & Procedure* § 2537 at 599 (1971). Under that standard "the Court is required to view the evidence, as well as all inferences properly deducible therefrom, in the light most favorable to the plaintiff." *Campbell* v. *Oliva*,

424, F. 2d 1244, 1245 (6th Cir. 1970). See, *Dowdell* v. *U.S. Industries, Inc.*, 495 F. 2d 641 (6th Cir. 1974); *Taylor* v. *Cirino*, 321 F. 2d 279 (6th Cir. 1963). The general rule is that if any substantial evidence supports a claim, the issue is for a jury. *Schulte & Bruns* v. *Great Lakes Stevedoring Co.*, 300 F. 2d 897, 899 (6th Cir. 1962). Turning to the present case, upon consideration of the entire proceeding, the Court finds that substantial evidence did exist to support the jury's verdict.

In particular, the jury was tasked with determining whether the defendants acted in good faith. They were specifically instructed by the Court to consider both the subjective and objective tests for good faith discussed above, specifically stated that evidence at trial which demonstrated that defendants used the bond forfeiture as a pretext for holding the plaintiff without an on-site hearing raised a jury question regarding defendants' claims of subjective good faith. Because there is ample testimony by defendants in the record from which the jury could infer that plaintiff's continued incarceration on the intoxication charge was in fact pretextual, the good faith issue was properly before the jury, and in the Court's view, their verdict must stand. Examples of this testimony follow:

Q. [By Mr. Wolfel]: Mr. Barkeloo, isn't it a fact that you used a bond forfeiture, as you call it, as a pretext, a mere pretext to hold me to investigate the allegations of a firearm?

A. Well, I believe that this is a fairly normal practice or has been by police agencies.

. . . . . .

Q. [By Mr. Wolfel]: Mr. Sanborn, (Barkeloo's

unit supervisor), were you really interested in the bond forfeiture or the firearm?

A. I can't understand you.

Q. Were you really interested in the bond forfeiture or the firearm?

A. Well, as I indicated to you, the bond forfeiture on the intoxication was a legal, lawful arrest and it is not unusual to use this type of arrest to investigate more serious charges.

. . . . . .

Q. [By Mr. Wolfel]: Would it be fair to say, Mr. Sanborn, that although you were holding me for a firearm, --

A. Could you speak up?

Q. I am trying to put my words together. Would it be fair to say that even though you fall back on the intoxication now as your pretext for holding me and arresting me, wasn't your primary concern then a firearm?

A. I think I said that.

In view of this and other testimony, the Court finds that there was substantial evidence from which the jury could find that the defendants failed to meet the test of subjective good faith. Accordingly, the motion for judgment notwithstanding the verdict must be denied.

Motion for New Trial

The defendants have moved the Court for a new trial on two grounds. They claim that the jury verdict was

against the weight of the evidence and that the damages awarded by the jury were excessive. The Court has carefully considered defendants' arguments on these matters and finds that they are not well taken. Once the jury concluded that the defendants acted in bad faith in denying plaintiff an on-site hearing, it was required to determine the extent of damage to plaintiff proximately caused by this denial. The plaintiff was arrested on May 30, 1973, and was eventually released on June 26, 1973, a total period of incarceration of 27 days. The first 10 days of incarceration were excluded from the jury's consideration in figuring damages. Thus, the jury had before it evidence on which they could conclude that the plaintiff was illegally detained from 0 to 17 days as a result of defendants' actions. Defendants make much of the fact that Barkeloo submitted a report on June 15 recommending Wolfel's release, and Sanborn approved the recommendation on June 18. The remaining period of Wolfel's incarceration, defendants claim, was the result of unavoidable procedural "red tape" in the department. Further, defendants claim that if Wolfel had been granted an on-site hearing the procedure would have lasted into the month of July. The fact remains, however, that Wolfel's incarceration was found by the jury to be the proximate result of defendants' action, taken in bad faith. After a full review of the proceedings, the Court is simply not persuaded that the jury's verdict was against the weight of the evidence or that the damages awarded were excessive.

Defendants also move the Court for a new trial on grounds that evidence of the plaintiff's prior convictions should have been admitted to impeach his credibility. At trial, the Court applied Rule 403 of the Federal Rules of Evidence and determined that the evidence should be excluded. The Court is not persuaded that the ruling

was error. Accordingly, defendants' motion is not well taken.

In summary, plaintiff's motion to set aside the judgment notwithstanding the verdict entered by the Court pursuant to S.D. Ohio R. 3.5.2 will be GRANTED. Rule 60(b), Fed. R. Civ. P. On the merits, defendants' motions for JNOV and for new trial will be DENIED.

So ORDERED.

Robert M. Duncan, Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-74-126

DENNIS M. WOLFEL

vs.

NICK SANBORN, et. al.,

JUDGMENT
Filed January 23, 1979

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,
IT IS ORDERED AND ADJUDGED THAT: the Judgment entered on October 26, 1978 is hereby set aside and JUDGMENT IS ENTERED FOR THE DEFENDANTS.

Dated at Columbus, Ohio this 23rd Day of January, 1979.

JOHN D. LYTER, CLERK

BY:
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-74-126

DENNIS M. WOLFEL,

Plaintiff

vs.

NICK SANBORN, et. al.,

Defendants

ORDER
Filed January 22, 1979

Plaintiff not having timely opposed defendants' November 3, 1978, motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, it is ordered pursuant to S.D. Ohio R. 3.5.2 that the motion be and it is hereby GRANTED. The judgment entered on October 26, 1978, is hereby set aside and judgment is entered for defendants.

Robert M. Duncan, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DENNIS M. WOLFEL

Plaintiff

vs.

Civil Action
C-2-74-126

NICK SANBORN
and
JOHN BARKELOO

Defendant

JUDGMENT
Filed October 26, 1978

This action came on for trial before the Court and a jury, Honorable Robert M. Duncan District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff(s) Dennis M. Wolfel recover of the defendant(s) Nick Sanborn and John Barkeloo the sum of One Thousand ($1,000.00) Dollars with interest thereon at the rate of six per cent (6%) as provided by law, and his costs of action.

Dated at Columbus, Ohio October 26, 1978.

JOHN D. LYTER, CLERK

BY:

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-74-126

DENNIS M. WOLFEL,

Plaintiff

vs.

NICK SANBORN, et. al.,

Defendants

MEMORANDUM AND ORDER
Filed July 14, 1978

This is an action for damages under 42 U.S.C. § 1983 resulting from the defendants' allegedly unconstitutional incarceration of the plaintiff for parole violation without a preliminary hearing as required by *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). The matter is before the Court on the defendants' motion for summary judgment on the remaining issue of the defendants' good faith following remand from the United States Court of Appeals for the Sixth Circuit. *Wolfel* v. *Sanborn*, 535 F. 2d 583 (6th Cir. 1977).

The Court of Appeals held that the defendants' good faith defense is governed by the two-pronged standard of *Wood* v. *Strickland*, 420 U.S. 308 (1975) and *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). *Wolfel, supra* at 591. The Court of Appeals further held that the defendants have satisfied the objective prong of *Wood.*

With respect to the subjective prong of the good faith defense, the Court of Appeals stated:

> We agree with the district court that the evidence the defendants used the bond forfeiture as a pretext for holding plaintiff without a preliminary *Morrissey* hearing raises a question regarding their claims of subjective good faith. We believe, however, that the determination of good or bad faith in the minds of the defendants (to the extent this can be determined) was a matter for the jury to determine in the first instance. 555 F.2d at 592.

The defendants argue that they are entitled to summary judgment since the Court has determined that there is no evidence that the defendants acted with actual malice. Defendants further contend that this Court's finding of a legal pretext applies only to the objective prong of the *Wood* standard. The Court cannot agree.

In remanding the case to this Court, the Court of Appeals was aware of this Court's finding that there was no evidence of actual malice. Nonetheless, the Court of Appeals held that "the evidence the defendants used the bond forfeiture as a pretext for holding plaintiff without a preliminary *Morrissey* hearing raises a question regarding their claims of subjective good faith." Although this Court's previous discussion of the legal pretext was in the context of the objective prong of *Wood*, a jury's consideration of the defendants' good or bad faith should be made on the basis of all the relevant facts. The Court believes that the defendants' use of a legal pretext may well be relevant evidence that may be considered by the jury.

Although it may appear that the basic facts in this case are not in dispute, the Court finds that the parties disagree in good faith concerning the inferences which may be drawn from these facts, and further finds that reason-

able minds could differ on the intention of the parties based on these facts. The United States Court of Appeals for the Sixth Circuit has repeatedly held that summary judgment is not appropriate under such circumstances. *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F 2d 1193, 1200 (6th Cir. 1974); *Equal Employment Opportunity Commission v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 427 F. 2d 1091, 1093 (6th Cir. 1970); *Hart v. Johnston*, 389 F. 2d 239 (6th Cir. 1968); *S.J. Groves & Sons Co. v. Ohio Turnpike Commission*, 315 F. 2d 235 (6th Cir. 1963). *See also, Kornbluh v. Stearns & Foster Co.*, 73 F.R.D. 307, 311-12 (S.D. Ohio 1976).

The defendants' motion for summary judgment is accordingly DENIED.

So ORDERED.

Robert M. Duncan, Judge
United States District Court

Nos. 76-1030-31

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DENNIS M. WOLFEL,
Plaintiff-Appellee, Cross-Appellant,

v.

NICK SANBORN, et al.,
Defendants-Appellants, Cross-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed May 2, 1977.

Before: PHILLIPS, Chief Judge and WEICK and EDWARDS, Circuit Judges.

PHILLIPS, Chief Judge. The appellee and cross-appellant, Dennis M. Wolfel, was arrested on parole by the Columbus, Ohio, Police Department and charged with intoxication. Wolfel posted bond, but this bond was forfeited when he failed to appear in court. Subsequently, Wolfel was arrested and his room searched by his parole officer, John Barkeloo, after Barkeloo received an oral complaint against Wolfel for brandishing a gun in public. Wolfel was incarcerated pending investigation of the gun charge. He was not accorded the preliminary hearing to determine probable cause to revoke parole required by *Morrissey* v. *Brewer*, 408 U.S. 471, 485 (1972),

because, pursuant to an unwritten policy of the Ohio Adult Parole Authority, Barkeloo and Nick Sanborn, the Regional Supervisor for the Parole Authority, determined that Wolfel's bond forfeiture on the intoxication charge obviated the need for a preliminary probable cause hearing. After 27 days of incarceration, Wolfel was released and returned to parole at the recommendation of Barkeloo.

On March 15, 1974, Wolfel brought this action for damages under 42 U.S.C. § 1983, alleging that Nick Sanborn and John Barkeloo had violated his constitutional rights incident to his arrest, the search of his room without a warrant, and his incarceration without a preliminary hearing. The District Court directed verdicts for the defendants on the arrest and search claims, but refused defendants' requested instructions on good faith in relation to the claim of incarceration without a preliminary hearing. A jury award of $1,000 in damages to Wolfel was sustained by the District Court. Both sides appealed. We affirm the directed verdicts on the arrest and search issues and reverse the judgment for damages on the ground that Sanborn and Barkeloo were entitled to submit their good faith defense to the jury.

I.

Dennis M. Wolfel, plaintiff and cross-appellant, was serving a one-to-fifteen year sentence for burglary in the night season when he was paroled from the Ohio Penitentiary on March 5, 1973. John Barkeloo, defendant, appellant and cross-appellee, was assigned by the Ohio Adult Parole Authority as supervising parole officer for Wolfel.

In the early morning hours of May 27, 1973, Gladys Kuhn, the owner of a sandwich shop, complained to the Columbus, Ohio, Police Department that Dennis Wolfel had been in her shop brandishing a pistol. The police responded and found Wolfel in a nearby tavern. Wolfel denied having a gun.

A search by the police of his person, the tavern and the adjacent grounds produced no weapon. The Columbus police arrested Wolfel on an intoxication charge and took him to the station where he posted a $30.00 bond and was released. Wolfel failed to appear on the intoxication charge on May 29, 1973, and his bond was ordered forfeited by a judge of the Municipal Court for Franklin County, Ohio.

On May 28, 1973, Wolfel again was arrested by the Columbus Police Department after a complaint by Gladys Kuhn. This second complaint involved charges of telephone harrassment and trespassing. Wolfel again posted bond and was released from custody. These charges of telephone harrassment and trespassing were dropped some months later at the request of the City Prosecutor.

On May 29, 1973, Gladys Kuhn appeared at the offices of the Ohio Adult Parole Authority to make a complaint against Wolfel. With John Barkeloo present, Mrs. Kuhn dictated a statement accusing Wolfel of brandishing a gun in her place of business on May 27th and making threatening gestures toward her and another employee. A typewritten copy of the statement was prepared but Mrs. Kuhn did not sign it.

Defendant Barkeloo arranged to meet with Wolfel on the next day, May 30th, at the home of Wolfel's grandmother where Wolfel maintained a room. Wolfel appeared voluntarily and accompanied Barkeloo and another parole officer back to the offices of the Parole Authority. Barkeloo informed Wolfel of the charges Gladys Kuhn had made against him. After consultation with Nick Sanborn, Columbus Regional Supervisor for the Ohio Adult Parole Authority and Parole Officer Barkeloo's immediate superior, Barkeloo arrested Wolfel for parole violations. Wolfel was permitted to contact his attorney and was then incarcerated in the county jail. Wolfel was not afforded a preliminary "on-site" hearing to determine whether there was probable cause to revoke his parole at the time of his arrest or during his subsequent incarceration.

On May 31, 1973 – one day after Wolfel's arrest and two days after Gladys Kuhn made her complaint to the Parole Authority – defendant Sanborn consulted with Barkeloo and then directed Barkeloo and another officer to go to Wolfel's grandmother's house and search for the firearm. Wolfel's living quarters consisted of a small, unlocked room in his grandmother's house which Wolfel occupied alone and without paying rent. The district court determined that Wolfel's grandmother had custody and control over the room Wolfel occupied and that she consented to the search of this room by Parole Officer Barkeloo and his associate on May 31. The search was conducted with Mrs. Wolfel in attendance and no firearm was found.

On June 16, 1973, defendant Barkeloo filed a report with the Parole Authority recommending that Wolfel be released from custody and returned to parole. This report was processed and approved and on June 26, 1973 (27 days after his arrest by defendant Barkeloo), Wolfel was placed back on parole.

The instant civil rights action was commenced by plaintiff Wolfel against defendants Sanborn and Barkeloo on March 15, 1974. At the time of trial two basic claims remained to be resolved: (1) that the defendants by the arrest and incarceration of plaintiff without an on-site hearing deprived plaintiff of his right to liberty and his right to due process; and (2) that defendants by their search of plaintiff's dwelling place without a warrant and without his consent deprived plaintiff of his fourth amendment freedom from unlawful search. Plaintiff sued for damages in the amount of $10,000 on each claim and an additional award of punitive damages.

After hearing the evidence adduced at trial, the district court directed verdicts for the defendants concerning the propriety of the arrest by Barkeloo on May 30, and concerning the search of Wolfel's room on May 31. The court found that Barkeloo had reasonable cause to believe that Wolfel had violated the terms of his parole and thus was authorized to

arrest Wolfel pursuant to Ohio Revised Code § 2967.15.[1] The court also found, as noted above, that Wolfel's grandmother exercised control over the room Wolfel occupied in her house, that she had authority to consent to a search of the room, and that she in fact had consented.

On the issue of incarceration without a preliminary on-site hearing, the evidence showed that the events in question occurred after the Supreme Court announced its decision in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) and that Wolfel was not accorded the on-site hearing indicated in that decision. Plaintiff introduced as an exhibit Parole Supervision Section Bulletin No. 13 promulgated by the Ohio Department of Rehabilitation and Correction and dated January 17, 1973. This Bulletin stated in part as follows:

I. PURPOSE

As a result of the ruling on June 29, 1972, by the United States Supreme Court in the case of John J. Morrissey and G. Donald Booher, petitioners, versus Lou B. Brewer, Warden, et al., the following procedures will be necessitated when a parole violation report is submitted.

II. POLICY

1) Except when the parolee has absconded and his whereabouts is unknown or when there has been a judicial determination by a court of probable cause (this includes preliminary hearing resulting in a bind over, Bill of Information, and Secret Indictment) or a conviction of any crime or an adjudication of any

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[1] O.R.C. § 2967.15 reads in pertinent part:

* * *

Whenever any parole officer has reasonable cause to believe that any parolee under the supervision of the authority has violated the terms and conditions of his pardon or parole, such parole officer may arrest such parolee, or may order any sheriff, deputy sheriff, constable, or police officer to make such arrest. A person so arrested shall be confined in the jail or detention home of the county in which he is arrested until released on parole or removed to the proper institution.

> fact constituting a violation of parole, a hearing must be afforded the parolee at or near the site of the alleged violation of his parole.
>
> 2) A) The Hearing: Technical Violations
> The hearing shall be conducted by the Regional Coordinator or person of supervisory rank designated by him. The supervisor shall be a person other than the supervisor controlling the case. The hearing shall be scheduled to take place within ten working days after our official detainer is filed against the parolee.

Defendants acknowledged that they were aware of the *Morrissey* decision and of Bulletin 13 at the time in question, but asserted that they reasonably and in good faith believed that plaintiff's May 29, 1973, bond forfeiture on the intoxication charge constituted a "conviction" within the meaning of Bulletin 13 and thus obviated the requirement for a *Morrissey* on-site probable cause hearing. Defendants first raised this defense of good faith in a motion for summary judgment filed with the district court prior to trial. Defendant Barkeloo submitted an affidavit in support of this motion stating as follows:

> Affiant assumes that the Adult Parole Authority failed to give Plaintiff an "on-site" hearing because the general practice and understanding at the Adult Parole Authority then was that a municipal court bond forfeiture, as had occurred in plaintiff's intoxication case, satisfied the "probable cause" finding requirement of *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) in parole revocation cases, even if there was more than one charge against the parolee.

In a deposition prior to trial, defendant Sanborn explained the unwritten policy on bond forfeitures this way:

> A. Once probable cause has been established, by virtue of the fact that he posted bond, was found guilty by the court, by forfeiting that bond, our central office

Case Review Section had thirty days within which to make a decision.

Q. Under the policy at that time, you could take the full thirty days even though the parolee was incarcerated?

A. That is correct.

Q. At that time the policy was that the bond forfeiture was sufficient to comply with whatever legal requirements you had?

A. That is correct.

Q. Okay. Is this still the policy?

A. No, it is not.

Q. Okay. You would now, if I am correct, have an actual hearing?

A. Right. We do not consider bond forfeitures at this time to mean a guilty plea or a court finding them guilty in absenteeism — absentee.

Q. Do you recall when this policy changed?

A. I'm not certain, but I think it was November, 1973.

• • •

At trial, defendants Sanborn and Barkeloo and Harold E. Harris, Deputy Superintendant of the Ohio Adult Parole Authority at the time in question, all testified that it was accepted procedure in the Parole Authority in May of 1973 to consider a bond forfeiture as sufficient showing of probable cause to revoke parole to allow for incarceration under Bulletin 13 without an on-site hearing. The only evidence of a contrary policy adduced by the plaintiff was the introduction of Bulletin 13 itself, which contains no reference to this unwritten bond forfeiture exception to the on-site hearing requirment.

At the close of all proof before the district court, the defendants requested the following instruction to the jury concerning their alleged good faith:

In the event the jury determines the rights of Dennis

> Wolfel have been violated by these defendants and the violation is the proximate cause of injury to the plaintiff, before it can return a verdict in favor of the plaintiff, the jury must consider whether or not the defendants acted in good faith.
>
> The defendants contend they, in good faith, believed it was not necessary to hold an on-site hearing to determine if there was probable cause that Dennis Wolfel was a parole violator. If the jury should believe from a preponderence of the evidence that the defendants reasonably believed in good faith it was proper not to have an on-site hearing, then a verdict for the defendants should be entered even though the jury may find the defendants violated the Civil Rights of Dennis Wolfel.
>
> However, mere good intentions which do not give rise to a reasonable belief that an on-site hearing was not required cannot justify the failure to provide an on-site hearing.

The district court declined to give the proposed instruction and, after hearing defendants' objections, also declined defendants' request that an alternative charge on "how the law of good faith affects the Plaintiff's claim" be given. Instead, the court instructed the jury as follows on the issue of liability for failure to provide an on-site hearing:

> The Court instructs you that a bond forfeiture does not remove the necessity of such a hearing as an essential element of due process of law.
>
> I instruct you that as a matter of law plaintiff was denied due process of law in that he was not given a hearing to determine whether there was reasonable cause to hold him in confinement pending another hearing to determine whether he had violated the provisions of his parole. Further, I instruct you that under the non-conflicting facts of this case the hearing should have been held no later than ten days from the date of his arrest, May 30, 1973.

> If you find that the acts or failure to act of either or both of the defendants was the direct or proximate cause of the failure to provide plaintiff a hearing, it is then your duty to determine an amount that will compensate plaintiff for his damage resulting from his confinement from June 8, 1973, to June 27, 1973. If you do not find, however, that the acts or failure to act of either defendant was the direct or proximate cause of the failure to provide plaintiff a hearing, you must find for defendants.

The jury resolved the causation question in favor of the plaintiff and awarded Wolfel $1,000 in damages. The district court entered judgment for the plaintiff for this amount on January 8, 1975.

Defendants Sanborn and Barkeloo filed alternative motions in the district court for judgment n.o.v. and for a new trial. They contended in support of their motions that the evidence at trial had conclusively established a good faith defense to the claim that the decision not to conduct an on-site hearing denied Wolfel his constitutional rights. In a memorandum and order dated March 18, 1975, the district court set aside the judgment against defendants and granted the motion for a new trial, stating as follows:[2]

> While the Court firmly adheres to its earlier opinion that a bond forfeiture is not a judicial determination of fact which suffices to supplant the need for a *Morrissey* on-site hearing, it would appear that if the defendants reasonably and in good faith relied upon a policy of the Ohio Adult Parole Authority in holding Mr. Wolfel without benefit of an on-site hearing, they may not be required to respond in damages under 42 U.S.C. § 1983 for such unconstitutional action. Whether such a policy

[2] Although the district court granted defendants a new trial on the on-site hearing issue and good faith, the court stated in the March 18 memorandum that the directed verdicts for the defendants on the arrest and search questions were not being reconsidered by the court.

existed and whether the defendants reasonably and in good faith relied upon it are questions of fact which cannot be resolved by the Court on a motion for judgment notwithstanding the verdict.

For the reasons set forth hereinabove, it is hereby ORDERED that the judgment entered herein on January 8, 1975, be and it hereby is set aside. This matter will be scheduled for trial upon a future order of the Court.

In anticipation of a new trial, defendants Sanborn and Barkeloo filed a motion for summary judgment with the district court, supported by affidavits from Barkeloo and from Harold E. Harris, Acting Superintendent of Parole Supervision. The Harris affidavit indicated that the office of the Attorney General of Ohio had approved the procedure regarding bond forfeitures and elimination of the on-site hearing requirement followed by defendants:

> Affiant further states that as Deputy Superintendent of Parole Supervision, he was a co-author of Parole Supervision Bulletin 13. Affiant further states that for purposes of Parole Supervision Bulletin 13 the Adult Parole Authority treated a municipal bond forfeiture as a judicial determination of a violation of parole. Furthermore affiant states that this policy was generally known within the Adult Parole Authority and it received prior approval from the Attorney General's office.
>
> Affiant further states that in the case of Dennis Wolfel, he requested independent verification of the policy from the Attorney General's Office which was given. Further Affiant states that the procedures employed in that case were in full compliance with the policies of the Adult Parole Authority as were then in existence.

Plaintiff argued in response to defendants' motion for summary judgment that the Supreme Court's analysis in *Wood*

v. *Strickland*, 420 U.S. 308 (1975), controlled the disposition of the case and under the reasoning in *Wood* the defendants had not acted in good faith because it was "clear and well decided" at the time in question that a municipal bond forfeiture did not constitute a conviction. Plaintiff cited *Torbett* v. *State*, 449 P.2d 725 (Okla. 1969), and *Almon* v. *Countryside Casualty*, 455 F.2d 503 (8th Cir. 1972), in support of this contention, and asked the court to reconsider its grant of a new trial.

In a memorandum dated July 29, 1975, the district court denied defendants' motion for summary judgment, and then reconsidered its grant of a new trial in light of *Wood*, the cases cited by plaintiff, and this court's opinion in *Glasson* v. *City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975). The court concluded that, although there was "undisputed evidence" in the record that the unwritten policy of the Parole Authority in May and June of 1973 was to consider a bond forfeiture to be a conviction for purposes of determining whether a parolee was entitled to a prelimnary hearing under *Morrissey* and Bulletin No. 13, it was "unreasonable" for defendants to have relied on this policy under the circumstances presented. The court found that defendants had used the unwritten policy as a pretext for holding plaintiff in custody while they investigated the weapons charge against him and, though there was "no evidence that the defendants acted out of actual malice," their conduct exceeded the constitutional limitations on the authority they exercised. The court stated in summary:

> . . . [T]he Court holds that the evidence concerning defendants' affirmative defense is as a matter of law insufficient for submission to a jury. The motion of defendants for summary judgment is denied. The order filed herein on March 18, 1975, is hereby vacated and held for naught. The judgment of $1,000 against Nick Sanborn and John D. Barkeloo is reinstated.

Defendants filed a notice of appeal to this court, and on September 2, 1975, plaintiff filed a motion with the district court seeking an allowance of attorneys fees in the amount of $3,210 on the theory that the constitutional rights vindicated by plaintiff's successful district court action "will inure to the benefit of all parolees similarly situated," and thus the defendants should bear the legal expense involved. The district court held that the plaintiff could recover $20.00 in attorneys fees from the defendants pursuant to 28 U.S.C. § 1923 (a), [3] but that the defendants were not liable for any fee in excess of that amount under *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

Defendants appeal the verdict and judgment for $1,000 as reinstated by the district court in its memorandum and order of July 29, 1975. Plaintiff cross-appeals the directed verdicts for defendants on the arrest and search issues, and plaintiff also appeals the district court's denial of its motion for attorneys fees in excess of the statutory $20.00.

II.

We conclude that defendants were entitled to have their good faith defense submitted to the jury and that the district court erred in finding that defendants' reliance on the unwritten policy of the Parole Authority was unreasonable.

The Supreme Court in a series of opinions including *Pierson* v. *Ray*, 386 U.S. 547 (1967), *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), *Wood* v. *Strickland*, 420 U.S. 308 (1975), and *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), has outlined the scope of the qualified immunity possessed by state officials under

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[3] 28 U.S.C. § 1923(a) reads in pertinent part:

> **1923. Docket fees and costs of briefs.**—(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
>
> $20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal or admiralty cases, . . .

42 U.S.C. § 1983. In *Wood, supra,* 420 U.S. at 321-22, in the context of determining whether and to what extent school officials are immune from damage suits under § 1983, the Court set forth a two-element standard for evaluating good faith and official immunity:

> The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation

> of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." *Pierson* v. *Ray*, 386 U.S., at 577. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Although the Supreme Court in *Wood* explicitly limited its discussion of good faith immunity to the "context of school discipline," in *O'Connor, supra.*, 422 U.S. at 577, the Court indicated that the standards defined in *Wood* are appropriately consulted to determine whether the superintendent of a state mental hospital can be made to answer in damages under § 1983. This court has discussed and applied the *Wood* criteria to assess the liability of school board members in a damages action under § 1983 involving non-disciplinary official action, *Shirley* v. *Chagrin Falls Exempted Vil. Schs. Bd. of Ed.*, 521 F.2d 1329 (6th Cir. 1975), *cert. denied sub nom. Shirley* v. *Burns*, 424 U.S. 913 (1976), and also to evaluate the qualified immunity from personal liability for damages available to members of a university Board of Trustees, *Martin* v. *University of Louisville*, 541 F.2d 1171 (6th Cir. 1976). In *Glasson* v. *City of Louisville*, 518 F.2d 899, 908 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975), this court recognized that police officers have a "defense of reasonableness and good faith to actions brought for damages under section 1983" which was defined in the context of the *Glasson* case as follows:

> Although only *Pierson* specifically concerns the liability of police officers for invasion of constitutional rights, both *Scheuer* v. *Rhodes* and *Wood* v. *Strickland* are helpful in determining the conditions under which an affirmative defense of reasonableness and good faith has been established. From an examination of all three cases, we con-

> clude that the factors to be considered in determining whether the defense has been established are whether the police officers knew or should have known that the complainant was engaged in the exercise of constitutionally protected activity, and if they knew (or should have known), whether they acted out of an honest and reasonable belief that their interference with the exercise of those rights was required to avoid imminent and serious injury to persons or property. Every asserted justification must be considered carefully on a case by case basis, and due regard must be given to the fact that the officers may be acting in the urgency of a street confrontation and not in the contemplative atmosphere of judicial chambers.

Other circuits have applied the two-element *Wood* test broadly to measure the immunity of public officers and officials from liability for damages under § 1983. The Seventh Circuit used the objective-subjective formulation articulated in *Wood* to determine that the conduct of correctional administrators was reasonable and in good faith in *Knell* v. *Bensinger*, 522 F.2d 720 (7th Cir. 1975). The same test was applied by the Fifth Circuit to prison officials and the Governor of Florida in *Kellerman* v. *Askew*, 541 F.2d 1089 (5th Cir. 1976). *See also Bryan* v. *Jones*, 530 F.2d 1210 (5th Cir. 1976). A number of courts have applied the two-pronged standard to evaluate the claims to imunity of law enforcement officers sued for damages under § 1983. *See, e.g., Rodriguez* v. *Ritchey*, 539 F.2d 394 (5th Cir. 1976); *Bursey* v. *Weatherford*, 528 F.2d 483 (4th Cir. 1975), *cert. granted*, 426 U.S. 946 (1976). The *Wood* analysis was applied by the Eight Circuit in a § 1983 action against state bank officials in *Guzman* v. *Western State Bank of Devils Lake*, 540 F.2d 948 (8th Cir. 1976). At least two courts have indicated that the principles stated in *Wood* may be applied generally to gauging a good faith defense to liability for damages under § 1983 in actions against public servants. *See Foster* v. *Zeeko*, 540 F.2d 1310, 1313 (7th Cir.

1976); *Morris* v. *Travisono*, 528 F.2d 856, 858 n. 5 (1st Cir. 1976).

We hold that the two-pronged standard articulated by the Supreme Court in *Wood* and *O'Connor* applies to the challenge to the official conduct of the parole officers in the case at bar. Applying that standard to the actions of defendants in not affording plaintiff an on-site *Morrissey* hearing, we conclude that the judgment of the district court must be reversed.

The first question is whether the defendants were acting "sincerely and with a belief that [they were] doing right . . ." when they determined that plaintiff was not entitled to an on-site hearing. *Wood, supra.*, 420 U.S. at 321. The district court stated in its memorandum of July 29, 1975, that "There is no evidence that the defendants acted out of actual malice." The court went on to find, however, that ". . . [T]he defendants seized upon a legal pretext as a means of keeping Wolfel in custody while more evidence could be sought. He was held not for possessing a weapon, according to defendants, but for intoxication." The district court did not consider this "pretext" to be *per se* constitutionally impermissible, but the court found that reliance on such a devise by law enforcement officials was subject to "careful scrutiny" where good faith was at issue.

We agree with the district court that the evidence the defendants used the bond forfeiture as a pretext for holding plaintiff without a preliminary *Morrissey* hearing raises a question regarding their claims of subjective good faith. We believe, however, that the determination of good or bad faith in the minds of the defendants (to the extent this can be determined) was a matter for the jury to determine in the first instance. The district court refused the defendants' requested instructions on this matter and we hold that this was error.

The second consideration under *Wood*, the objective prong of the test, is whether the defendants acted "with such disregard of the [plaintiff's] clearly established constitutional

rights that [their] action cannot reasonably be characterized as being in good faith." *Wood, supra.*, 420 U.S. at 322. The district court's conclusion that the defendants' reliance upon the unwritten policy of the Parole Authority regarding bond forfeitures was unreasonable as a matter of law is not supported by the record or the historical setting of this case.

The decision in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), was announced by the Supreme Court on June 29, 1972. As Deputy Superintendent Harris observed at trial, *Morrissey* worked substantial changes in the law regarding the constitutional rights of parolees: "The decision did, I believe, to corrections what the *Miranda* decision had done to police departments. It required revamping, restructuring of procedures and programs." The two-hearing scheme established by the *Morrissey* decision, which included the preliminary on-site hearing at issue herein, was new to the law of Ohio.

Bulletin 13 of the Ohio Department of Rehabiltaton and Correction, co-authored by Deputy Superintendent Harris, appeared in mid-January of 1973. This Bulletin, according to its stated purposes (See excerpt reproduced in text, *supra.*), was intended to implement new procedures necessitated by *Morrissey*. The events here in question occurred in late May and June of 1973 – approximately 4½ months after the promulgation of Bulletin 13.

It is uncontradicted on the record before us that, despite the language of Bulletin 13, it was the policy of the Adult Parole Authority in May and June of 1973 to consider a municipal bond forfeiture as obviating the need for a preliminary on-site hearing. This policy had received the approval of the Office of the Attorney General of Ohio.

Can it be said on these facts that, as a matter of law, plaintiff herein had a "clearly established constitutional right" to an on-site hearing which defendants could not reasonably deny him based on the bond forfeiture policy of the Parole Authority? We do not think so. The cases cited by plaintiff in

support of the proposition that it was "basic and unquestioned" in May of 1973 that a bond forfeiture did not obviate the *Morrissey* on-site hearing requirement were not binding on the defendants in Ohio and, upon scrutiny, do not clearly support the legal proposition for which they are cited. We note that our decision in *Glasson, supra.*, 518 F.2d at 899, is distinguishable from the instant case on the issue at hand because of the determination in *Glasson* that clearly established first amendment rights to peaceful communication were disregarded by the police officers therein.

We have no quarrel with the district court's holding that a municipal bond forfeiture does not now satisfy the *Morrissey* requirement of a preliminary determination of probable cause to revoke parole. Defendants do not challenge this determination, and the unwritten policy of the Parole Authority in this regard was changed some time after the events herein. We disagree with the district court's holding that defendants were not entitled on the facts of this case to have the jury determine whether they acted unreasonably in May and June of 1973 when they relied on the unwritten policy of the Parole Authority and thereby held plaintiff in custody for 27 days without an on-site hearing. *See O'Connor, supra.*, 422 U.S. at 577.

III.

In reviewing plaintiff's contentions that the directed verdicts on the arrest and search issues were improvidently granted by the district court, this court must apply the strict standard that a directed verdict was not proper unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict. *Reeves* v. *Power Tools, Inc.*, 474 F.2d 375, 380 (6th Cir. 1973). Where there is conflicting evidence presented sufficient to raise a material issue of fact, a directed verdict should not be granted, and credibility of evidence is not to be considered in making the determination.

O'Neill v. *Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975); *Greer* v. *United States*, 408 F.2d 631, 635 (6th Cir. 1969). Applying these standards to the case at hand, we hold that the district court correctly directed verdicts for the defendants on the arrest and search issues.

There is no dispute concerning the material facts surrounding the defendants' decision to arrest plaintiff on May 30, 1973. Plaintiff's argument that the defendants did not have "reasonable cause"[4] to make an arrest because the Columbus Police Department had investigated the complaints against plaintiff and declined to arrest him based on those complaints has no support in logic or authority. This court cannot conclude from the bare fact that police officers do not arrest a suspect or charge him with a crime that there was no probable cause to effectuate an arrest. We also note, as a factual matter, that the Columbus Police did arrest the plaintiff on May 28th based on the complaints against him by Mrs. Gladys Kuhn. Mrs. Kuhn's allegations of brandishing a gun, trespass and harrassment on the 27th and 28th of May were communicated immediately to the Columbus Police and were not stale when presented to the Parole Authority on the 29th. The cases cited by plaintiff challenging the reliability of the information before the defendants do not involve victim-informants and are otherwise distinguishable from the facts herein. We agree with the district court that the only reasonable conclusion from the facts presented was that defendants could not be made to answer in damages under § 1983 for the arrest of plaintiff on May 30.

Similarly, we affirm the district court's determination that as a matter of law plaintiff's fourth amendment rights were not violated by the search of his room on May 31, 1973. Plaintiff contends that there was a contested material question of fact before the district court concerning consent to the search

[4] See O.R.C. § 2967.15, quoted in note 2, *supra*.

by his grandmother; however, we do not find evidence in the record to support this contention. The parole officers who conducted the search testified that they had permisison from Mrs. Wolfel. When asked whether the officers had requested her permission to search, Mrs. Wolfel responded: "Why, I don't know. I reckon they did. I won't say for sure." There was no evidence indicating coercion or other impropriety on the part of the officers and we agree with the district court's conclusion that there was no dispute on the consent question to be submitted to the jury. We also concur in the district court's determination that occasional references to the room in question as "Dennis's room" by Mrs. Wolfel did not, in light of all the evidence, raise a jury question concerning Mrs. Wolfel's authority to consent to a search of the room.

In light of our resolution of the issues hereinabove, we affirm the district court's holding that plaintiff may not recover attorney's fees, without reaching the merits of plaintiff's argument concerning *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

Accordingly, and for the reasons indicated, we reverse the verdict and judgment of the district court awarding $1,000 in damages to plaintiff, and remanded this matter to the district court for further proceedings consistent with this opinion. We affirm the directed verdicts by the district court on the arrest and search issues, and also affirm the denial of attorneys fees to plaintiff.

No costs are taxed. The parties will bear their own costs on this appeal.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action File No. C-2-74-126

DENNIS M. WOLFEL

vs. JUDGMENT

NICK SANBORN, et. al.

This action came on for consideration before the Court, Honorable Robert M. Duncan, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered. It is Ordered and Adjudged that the evidence concerning defendants' affirmative defense is as a matter of law insufficient for submission to a jury. The motion of defendants for summary judgment is denied. The order filed herein on March 18th, 1975, is hereby vacated and held for naught. The judgment of $1,000.00 against Nick Sanborn and John D. Barkeloo is reinstated.

Dated at Columbus, Ohio on this 30th day of July, 1975.

JOHN D. LYTER,
Clerk of Court

BY:

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

DENNIS M. WOLFEL,
Plaintiff

vs.

Civil Action
No. 74-126

NICK SANBORN, et al.,
Defendants

MEMORANDUM AND ORDER
Filed July 29, 1975

This is an action for damages, brought pursuant to 42 U.S.C. § 1983. The Court has jurisdiction pursuant to 28 U.S.C. § 1343(3). This case was tried to a jury, which returned a verdict in the amount of One Thousand Dollars ($1,000.00) against defendants Nick Sanborn, a regional supervisor of the Ohio Adult Parole Authority, and John D. Barkeloo, a parole officer with the same state agency. After trial, defendants moved pursuant to Fed. R. Civ. P. 59 for a new trial, which motion was granted by order of March 18, 1975. This matter is again before the Court, defendants having moved for summary judgment on the question of their "good faith and reasonable belief" defense. The facts pertinent to this defense are not in dispute.

On May 29, 1973, plaintiff Dennis M. Wolfel was a parolee under the supervision of the Ohio Adult Parole Authority. His parole officer was defendant Barkeloo, and Barkeloo's supervisor was defendant Sanborn. On

that date one Gladys Marie Kuhn, proprietress of a sandwich shop in Columbus, Ohio, went to Mr. Barkeloo's office and dictated to him a statement in which she alleged that Wolfel had threatened her and an employee of hers with a chrome-plated revolver two days before. Ms. Kuhn declined to sign the statement. On the strength of her unsigned complaint, Mr. Barkeloo arrested Wolfel the following day for violation of his parole. Mr. Wolfel was incarcerated in the Franklin County jail.

The Court has already held that Mr. Wolfel's arrest and the subsequent search of his residence were lawful. The arrest and the search are not at issue on the present motion for summary judgment.

On June 29, 1972, the United States Supreme Court decided *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). The Court held that the Due Process Clause of the Fourteenth Amendment requires that a state must provide a parolee with certain due process safeguards before his parole may be revoked. "Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole." 408 U.S. at 479. The Court established a two-tiered system of hearings for parole revocation: the preliminary on-site hearing and the parole revocation hearing itself. The instant case concerns the failure of the defendants to provide plaintiff a preliminary hearing. Referring to the parolee's arrest as the "first stage" of the parole revocation process, the Court stated:

> The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. There is typically a substantial time lag between the arrest and the eventual

> determination by the parole board whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.

408 U.S. at 485 (citations omitted).

Mr. Barkeloo arrested Mr. Wolfel on May 30, 1973, because he had received information that the parolee had had a weapon in his possession, in violation of the terms of his parole. On May 31, Barkeloo and another parole officer searched Wolfel's residence, but found no weapon. Mr. Wolfel remained in custody until June 26, 1973, while Mr. Barkeloo and others attempted to verify Ms. Kuhn's story and to persuade Ms. Kuhn to sign her statement and testify against Wolfel during revocation proceedings. At his deposition of October 21, 1974, defendant Sanborn testified:

> The [June 26, 1973] release was brought about primarily because we had staffed the case; we did not want to pursue the firearms charges with the evidence that we had. We could not develop sufficient evidence at that time to pursue that; how-

> ever, we could have pursued the intoxication charge and recommended a return solely upon that charge.

The record supports no other findings but that Wolfel was arrested for carrying a weapon, he was held for approximately one month while Ms. Kuhn's charges were being investigated, and he was released, without any hearing ever having been held, when defendants Barkeloo and Sanborn were unable to convince Ms. Kuhn to stand behind her complaint and no other evidence concerning unlawful possession of a handgun by Wolfel could be found.

Morrissey requires that a parolee be given a preliminary on-site hearing "as promptly as convenient after arrest while information is fresh and sources are available." 408 U.S. at 483. The Court charged the jury at trial of this cause that the defendants were required under *Morrissey* and the facts of this case to provide Wolfel a preliminary hearing within ten (10) calendar days of his arrest. The Court adheres to its earlier opinion that Wolfel was unconstitutionally incarcerated from that time through the time that he was released, approximately seventeen (17) days.

The reference by Mr. Sanborn in his October 1974 deposition to an intoxication charge against Mr. Wolfel is of importance to this case. Gladys Marie Kuhn's original complaint about Mr. Wolfel's alleged conduct was not lodged with Mr. Barkeloo, but with the Columbus police department. She called the department late in the evening of May 26 or early in the morning of May 27, 1973, and stated that Wolfel had been in her place of business, brandishing a weapon. Columbus police officers who responded to her call located Mr. Wolfel in a tavern

adjacent to Ms. Kuhn's sandwich shop, but were unable to locate any weapon on his person or in the vicinity. He was nevertheless arrested for intoxication, booked, and released after he posted bond. He was scheduled to appear in the Franklin County Municipal Court on May 29, 1973; when he did not appear, his bond was ordered forfeited.

The defendants testified at trial and on deposition that Wolfel was not afforded a preliminary hearing because he had forfeited bond on the intoxication charge. The defendants were at the time fully aware of the *Morrissey* requirements; Bulletin No. 13 (as amended) of the Parole Supervision Section of the Ohio Adult Parole Authority was the agency's response to *Morrissey*. At the time it provided, in part, as follows:

> Except . . . when there has been a judicial determination by a court of probable cause (this includes preliminary hearing resulting in a bind over, Bill of Information, and Secret Indictment) or a conviction of any crime or an adjudication of any fact constituting a violation of parole, a hearing must be afforded the parolee at or near the site of the alleged violation of his parole.

A bond forfeiture is, of course, not a judicial determination of probable cause. Nor is it an adjudication of any fact other than the fact that the person charged with a crime did not make the scheduled court appearance. If a determination of the guilt or innocence of the non-appearing defendant is to be made, he must be brought before the court, usually by use of a bench warrant. Mr. Wolfel was not ordered into court on the intoxication charge, and there is no evidence in the record of this case which indicates that any determination concerning the validity of the intoxication charge was ever made.

Although the bond forfeiture was neither a judicial determination of probable cause nor a conviction of any crime, defendants Barkeloo and Sanborn nevertheless insist that their failure to provide plaintiff a timely preliminary hearing was justified, if not by the terms of Bulletin No. 13, then by the unwritten policy of the Ohio Adult Parole Authority at the time.

There is undisputed evidence in the record that the unwritten policy of the agency in May and June of 1973 was to consider a bond forfeiture to be a conviction for purposes of determining whether a parolee was entitled to a preliminary onsite hearing under *Morrissey* and Bulletin No. 13. Defendants have submitted in support of their motion for summary judgment the affadavit of H. E. Harris, who was, in May and June of 1973, Deputy Superintendent of Parole Supervision for the Ohio Adult Parole Authority. His affidavit includes the following paragraphs:

> Affiant further states that as Deputy Superintendent of Parole Supervision, he was co-author of Parole Supervision Bulletin 13. Affiant further states that for purpose of Parole Supervision Bulletin 13 the Adult Parole Authority treated a municipal bond forfeiture as a judicial determination of a violation of parole. Furthermore affiant states that this policy was generally known within the Adult Parole Authority and it received prior approval from the Attorney General's office.
>
> Affiant further states that in the case of Dennis Wolfel, he requested independent verification of the policy from the Attorney General's Office which was given. Further Affiant states that the procedures employed in that case were in full

compliance with the policies of the Adult Parole Authority as were then in existence.

Similarly, Mr. Sanborn testified as follows during his October 1974 deposition:

A. [By Mr. Sanborn] as our procedure relates, at that time, once a person posts bond, forfeits bond, is adjudicated guilty in that fashion, our case review section has thirty days in which to make a determination.

Q. [By Mr. Hutson] You normally revoke parole based on a single incidence of intoxication, at least in the middle part of '73?

A. No, we do not--did not.

Q. So, what we're really talking about here is the concealed weapons charge, . . .

A. That's exactly right.

Q. . . . that's the primary concern.

A. That's exactly right. However, we felt we were justified in terms of the bond forfeiture.

It is well settled that state officials such as these defendants have in an action for damages under 42 U.S.C.§ 1983 the affirmative defense of having acted in good faith (a subjective standard) and in the reasonable belief that their actions were in fact lawful (an objective standard). *Wood v. Strickland*, ____U.S.____, 43 U.S. L.W. 4293 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967). Defendants contend that they are entitled to judgment as a matter of law because, on the facts presented, reasonable minds could

not differ concerning this affirmative defense. Plaintiff responds by arguing that there is not sufficient evidence to support defendants' affirmative defense, and he seeks reconsideration of the Court's March 18, 1975 order vacating the judgment in this case and granting defendants a new trial.

The Court is in agreement with the parties when they assert that a new trial is not warranted in this case. The facts which bear upon the asserted defense are simply not in dispute. There is no evidence that the defendants acted out of actual malice. Rather, the very difficult question which this motion presents concerns the reasonableness of the defendants' actions in light of the mandate of *Morrissey*.

Wood v. Strickland, _____U.S._____, 43 U.S.L.W. 4293 (1975) was an action brought by Arkansas high school students for monetary damages for allegedly unconstitutional disciplinary action taken against them by the defendant school officials. The Supreme Court made the following observations concerning the "good faith and reasonable belief" defense under 42 U.S.C. §1983:

> To be entitled to a special exemption from the categorial remedial language of §1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the

> proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983 . . . . .
>
> A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

43 U.S.L.W. at 4298. Of course, in the instant case we are not concerned with voluntary public servants who serve only part-time in their official capacities and whose most coercive disciplinary act is expulsion from school. We are concerned with trained public officials who are vested with substantial supervisory discretion concerning their charges.

It is pertinent to note that the discretion of a parole officer was one of the concerns which led the Supreme Court to decide in *Morrissey* that a preliminary on-site hearing is required by the Constitution. The following is a paragraph from *Morrissey*, 408 U.S. at 485-86 (footnotes omitted):

> In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. It would be unfair to assume that the supervising parole officer does not conduct an interview with the parolee to confront him with the reasons for revocation before he recommends an arrest. It would also be unfair to assume that the parole

officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer. However, we need make no assumption one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them. *Goldberg v. Kelly* [397 U.S. 254 (1970)] found it unnecessary to impugn the motives of the caseworker to find a need for an independent decisionmaker to examine the initial decision.

In *Glasson v. City of Louisville,* F. 2d (6th Cir. No. 73-1509, June 13, 1975) the United States Court of Appeals for the Sixth Circuit considered the "good faith and reasonable belief" defense in the context of a § 1983 action brought against Louisville, Kentucky, police officers. The defendant police officers were among those assigned to protect the President of the United States while he was in a motorcade in Louisville. The Assistant Chief of Police of Louisville gave defendants their orders on the morning of the motorcade; they were instructed "to destroy any sign or poster that was 'detrimental' or 'injurious' to the President of the United States." Slip opinion at 3. Plaintiff Glasson positioned herself along the motorcade route with a sign critical of the president; the defendant police officers, complying with the general orders they had been given, took away her placard and tore it up.

The Sixth Circuit made the following observations concerning the defense asserted:

> To hold that a police officer is exonerated from liability if he merely acts in subjective good faith might foster ignorance of the law or, at least, encourage feigned ignorance of the law. This we are unwilling to do. The law does not expect police officers to be sophisticated constitutional or criminal lawyers, but because they are charged with the responsibility of enforcing the law, it is not unreasonable to expect them to have some knowledge of it. We cannot permit a police officer to avoid liability for damages by pleading ignorance of the law when he unreasonably or in bad faith oversteps the bounds of his authority and invades the constitutional rights of others. At the same time, courts should not 'second guess' police officers who are often required to assess a potentially dangerous situation and respond to it without studied reflection. Thus, even though a police officer may not have chosen the wisest or most reasonable course of action, he will not be civilly liable if his conduct is based on a reasonable and good faith belief that it was necessary under the circumstances.

Slip opinion at 18. The Court went on to find, after "an independent examination of the whole record," Slip opinion at 19, that the defendants had not acted reasonably and in good faith, and that they should therefore be required to respond in damages under §1983. Slip opinion at 20.

Courts have found actions of state officials to be reasonable when undertaken in reliance upon ordinances or statutes,[1] standard administrative procedures,[2] court orders,[3] physicians' advice concerning the condition of a prisoner,[4] and the advice of counsel.[5] The typical

situation concerns the denial of some privilege or right which is thereafter held to be constitutionally protected. See, *e.g.*, *Chesney v. Adams*, 377 F. Supp. 887. 896 (D. Conn. 1974), *aff'd without opinion* 508 F. 2d 836 (2d Cir. 1975). The principle involved is that it would be unfair to require of state officials that they predict accurately the future course of constitutional law. Thus, in *Pierson v. Ray*, 386 U.S. 547, 555 (1967), the Court spoke of "excusing [a police officer] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional . . . ."

One of the difficulties which can arise in such cases is demonstrated by *Flemming v. South Carolina Electric and Gas Company*, 239 F. 2d 277, 279 (4th Cir. 1956). After the Supreme Court had struck down "separate but equal" educational facilities, but before South Carolina's segregation statutes concerning public transportation had been challenged, a bus driver employed by the defendant company had ordered Sarah Mae Flemming to change her seat on a bus. The district court dismissed the action, holding, *inter alia*,

> that the separate but equal doctrine of Plessy v. Ferguson, as applied to the bus driver, was not repudiated by this Court until after the event on which the suit is based; and that it would be unjust to apply the new rule retroactively and hold the bus company liable for damages for an act which was lawful when it was performed.

239 F. 2d at 279-79. The United States Court of Appeals for the Fourth Circuit reversed. It was not the specific statute involved which was determinative, but the "constitutional doctrine" underlying it:

> Whether action taken under a statute valid under the constitutional doctrine prevailing at the time it was taken is protected where the statute is subsequently declared unconstitutional we need not decide, since here the only basis upon which the statute could be sustained, the 'separate but equal' doctrine, had been repudiated by the Supreme Court prior to the commission of the act constituting the ground of liability. While we think the statute may not be relied on, under such circumstances, as a complete defense to liability, we do think that it may properly be considered by the jury on the issue of damages.

239 F. 2d at 279 (footnote omitted).

The Court now turns to the specific factual circumstances which existed when the events of which plaintiff complains occurred. The totality of these circumstances must be considered in determining whether defendants Barkeloo and Sanborn reasonably relied upon the unwritten policy of the Ohio Adult Parole Authority in failing to provide plaintiff a preliminary hearing.[6]

The first factor which merits consideration is that the defendants knew from the start of this episode that there were substantial problems of proof concerning the weapon charge. Ms. Kuhn would not sign her statement and would not testify at parole revocation proceedings. In addition, no physical evidence was ever unearthed, despite the fact that Mr. Wolfel was arrested and searched the same evening that Ms. Kuhn alleged she was threatened. The bar where he was arrested and its environs were searched. His residence was searched.

The defendants had no more information concerning the weapon charge ten days after Wolfel's arrest than they had the day he was arrested. Mr. Sanborn testified at

his October, 10th deposition that Wolfel was released on June 26, 1973, "because we had staffed the case; we did not want to pursue the firearms charges with the evidence that we had. We could not develop sufficient evidence at that time to pursue that . . . " The same could be said concerning the situation which existed earlier in the month. The entire case concerning the weapon charge, then and now, rested upon Ms. Kuhn, who would not stand behind her complaint.

In spite of this paucity of evidence concerning the weapon charge, the defendants seized upon a legal pretext as a means of keeping Wolfel in custody while more evidence could be sought. He was held not for possessing a weapon, according to defendants, but for intoxication.

There is certainly nothing legally reprehensible about the rather common police practice of holding a defendant on a lesser charge, as to which there is evidence, while conducting an investigation concerning a greater offense. The accused in such a case is lawfully in custody. Constitutional difficulties arise immediately, however, when in such a case the grounds for the legal pretext are insufficient to excuse the deprivation of the liberty of the accused. While use of such indirection to justify continued incarceration is not *per se* repugnant to our constitution and laws, reliance by law enforcement officials upon such a device in support of a "good faith and reasonable belief" defense bears careful scrutiny.

That the intoxication charge was in fact a pretext in this case is amply supported by the record. Mr. Sanborn has acknowledged that in May and June of 1973 a single episode of parolee intoxication did not "normally" result in revocation of parole. More revealing is the fact that Wolfel was released when the defendants decided that proof of the weapon charge would not be forth-

coming. Although they insist that Wolfel's bond forfeiture meant to them that some judicial finding had been made concerning intoxication, no effort was made by either of them to have his parole revoked on that ground.

Yet another factor which bears consideration in this case is that of the nature of the constitutional right which the defendants infringed. In *Glasson v. City of Louisville*, F. 2d (6th Cir. No. 73-1509, June 13, 1975), discussed hereinabove, the constitutional right involved flowed from the First Amendment. Such rights have traditionally been accorded high priority by the courts of this country, a fact which may help to explain the Sixth Circuit's holding that individual police officers must respond in damages for actions which arguably were within the general orders they had received from their superiors. *Flemming v. South Carolina Electric and Gas Company*, 239 F. 2d 277 (4th Cir. 1956), also discussed hereinabove, concerned racial discrimination, another area of constitutional law which receives special treatment from the courts.

The constitutional right involved in the instant case, that of a parolee to an informal hearing, raises neither First Amendment nor racial considerations. The right involved is, however, an express check upon the lawful authority of a parole officer. Prior to *Morrissey*, the practice in some states was to re-incarcerate an alleged parole violator solely on the basis of his parole officer's written report; no hearing of any kind was provided the parolee until after he had been back in prison for some months. See *Morrissey*, 408 U.S. at 472-73 and 475-76. The decision in *Morrissey* divested parole officers of such substantial discretionary power, and provided that after arrest and before revocation proceedings, "someone not directly involved in the case," 408 U.S. at 485, must determine whether there is cause to hold the parolee

pending a final decision of the parole board on revocation. In endeavoring to determine whether these defendant state officials acted reasonably, then, it is pertinent to note that their actions transgressed a specific constitutional limitation upon the authority which they exercised.

Other pertinent factors are present in this case, such as the fact that the unwritten policy of the Ohio Adult Parole Authority found scant support in its written policy, and the fact that the decision not to afford Wolfel a preliminary on-site hearing was made in a calm and detached[7] setting. The Court considers the factors set out in the preceding paragraphs to be determinative of the question of the reasonableness of the defendants' conduct. On balance, the Court concludes that under the circumstances present here the defendants' reliance upon the unwritten policy of the Authority was unreasonable.

For the reasons set forth hereinabove, the Court holds that the evidence concerning defendants' affirmative defense is as a matter of law insufficient for submission to a jury. The motion of defendants for summary judgment is denied. The order filed herein on March 18, 1975, is hereby vacated and held for naught. The judgment of $1,000 against Nick Sanborn and John D. Barkeloo is reinstated.

It is so ORDERED.

Robert M. Duncan, Judge
United States District Court

[1]*Hanna v. Drobnick*, 514 F.2d 393, 397 (6th Cir. 1975); *Tucker v. Maher*, 497 F.2d 1309, 1313 (2d Cir.), *cert. denied* U.S. , 43 U.S.L.W. 3280 (1974); *Pueschel v. Leuba*, 383 F. Supp. 576, 583 (D. Conn. 1974); *Chesney v. Adams*, 377 F. Supp. 887, 896 (D. Conn. 1974), *aff'd without opinion* 508 F.2d 836 (2d Cir. 1975).

[2]*Skinner v. Spellman*, 480 F.2d 539 (4th Cir. 1973); *Eslinger v. Thomas*, 476 F. 2d 225 (4th Cir. 1973); *Lewis v. Johnson*, 383 F. Supp. 600, 603 (E.D. Pa. 1974); *Fife v. Crist*, 380 F. Supp. 901, 911 (D. Montana 1974); *Bracey v. Rundle*, 368 F. Supp. 1186, 1188-90 (E.D. Pa. 1973).

[3]*McCray v. Maryland*, 456 F.2d 1, 5 (4th Cir. 1972); *Lockhart v. Hoenstine*, 411 F.2d 455, 460 (3d Cir.), *cert. denied* 396 U.S. 491 (1969).

[4]*Schmidt v. Wingo*, 499 F.2d 70, 73-74 (6th Cir. 1974).

[5]*Morales v. Turman*, 383 F. Supp. 53, 68 (E.D. Tex. 1974).

[6]The Court specifically charged the jury that it must find "that the acts or failure to act of either or both of the defendants was the direct or proximate cause of the failure to provide plaintiff a hearing" before a verdict could be returned for plaintiff.

[7]*Cf. Whirl v. Kern*, 407 F.2d 781, 792 (5th Cir.), *cert. denied* 396 U.S. 901 (1969) (citations and footnote omitted):

> A jailer, unlike a policeman, sets at his leisure. He is not subject to the stresses and split second decisions of an arresting officer, and his acts in

discharging a prisoner are purely ministerial. Moreover, unlike his prisoner, the jailer has the means, the freedom, and the duty to make necessary inquiries. While not a surety for the legal correctness of a prisoner's commitment, he is most certainly under an obligation, often statutory, to carry out the functions of his office. Those functions include not only the duty to protect a prisoner, but also the duty to effect his timely release.

A-76

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DENNIS M. WOLFEL,
Plaintiff

vs.

Civil Action
No. 74-126

NICK SANBORN, et. al.,
Defendants

MEMORANDUM AND ORDER
Filed March 18, 1975

This case having been tried before a jury, and a verdict having been returned against defendants Sanborn and Barkeloo, the matter is now before the Court upon these defendants' Fed. R. Civ. P. 50(b) motion for judgment notwithstanding the verdict and their alternative motion for a new trial.

This 42 U.S.C. §1983 action[1] was filed by plaintiff Wolfel, pro se, on March 15, 1974, when he was granted leave of Court to proceed in forma pauperis. The gravamen of the original complaint was that John D. Barkeloo and Michael Smith, acting as parole officers of the Ohio Adult Parole Authority, unlawfully searched plaintiff's dwelling place at 1230 Minnesota Avenue, Columbus, during May or June of 1973, pursuant to the order of Nick Sanborn, Regional Supervisor of the Ohio Adult Parole Authority. The complaint also alleged that during the search Barkeloo and Smith unlawfully seized and

appropriated for their own use certain personal property, including cash, belonging to plaintiff.

On April 9, 1974, the Court appointed Mr. Jeffrey W. Hutson to serve as plaintiff's counsel in this action. On April 29, 1974, plaintiff moved pro se to amend his complaint to allege that defendants Barkeloo and Smith had unlawfully arrested and incarcerated him. On September 4, 1974, plaintiff's appointed counsel filed by leave of Court an amended complaint, alleging four causes of action.

When the case came on for trial, plaintiff elected to proceed on only the first and second causes of action alleged in the amended complaint; the Court accordingly dismissed the third and fourth.[2] As set out in the amended complaint, the substance of the first cause of action was as follows:

> On or about May, 1973, the Defendant, Nick Sanborn, acting under the color of state law, caused the Defendants John D. Barkeloo and Stephen Smith under color of state law, to apprehend the Plaintiff, Dennis M. Wolfel, and place him in the custody of the Sheriff of Franklin County, Ohio. The arrest, apprehension and incarceration of the Plaintiff, Dennis M. Wolfel, was done without probable cause or proper warrant. Said Plaintiff was incarcerated for a period of twenty seven (27) days, without benefit of an on-site hearing. These actions of the Defendants, under color of state law, deprived the Plaintiff of his right to be at liberty, and deprived him of due process of law as secured by the Constitution of the United States, injuring him in the amount of ten thousand dollars ($10,000.00).

The second cause of action was stated as follows:

> Plaintiff, Dennis M. Wolfel, adopts by reference paragraph one and further states that while said Plaintiff was incarcerated in the Franklin County Jail, under the immediate control and supervision of the Sheriff of Franklin County, Ohio, Defendants John D. Barkeloo and Stephen Smith, acting under the direction and supervision of the Defendant, Nick Sanborn, came into his dwelling place and without his consent and without proper warrant and under color of state law, did unlawfully search said dwelling place. Said Defendants had no probable cause to search, and acted unlawfully, depriving the Plaintiff of his freedom from unlawful searches in violation of the Fourteenth Amendment to the Constitution of the United States, injuring him in the amount of ten thousand dollars ($10,000.00).

The facts pertinent to this action as developed at trial are essentially as follows. Plaintiff was serving a one-to fifteen year state sentence for burglary in the night season when he was paroled from the Ohio Penitentiary on March 5, 1973. On or about May 27, 1973, one Gladys Marie Kuhn, proprietress of a sandwich shop in Columbus, Ohio, telephoned Columbus police and stated that plaintiff had brandished a chrome-plated revolver in front of her and a female employee at her place of business during the evening of May 26 or the early morning of May 27, 1973. Columbus police officers located plaintiff in a tavern adjacent to the sandwich shop, but no revolver was discovered. Plaintiff was arrested by the police for intoxication, and posted bond. When plaintiff failed to appear on the intoxication charge

on May 29, 1973, this bond was ordered forfeited by a judge of the Franklin County Municipal Court.

On May 29, 1973, Gladys Marie Kuhn went to defendant Barkeloo's office in Columbus and dictated a statement to him in which she alleged that plaintiff had threatened her and her employee with a firearm. She declined, however, to sign the statement. Barkeloo arrested plaintiff the next day for alleged violation of his parole. On May 31, 1973, defendants Barkeloo and Smith searched plaintiff's dwelling place in Columbus but found no weapon.

Having heard the evidence adduced at trial, and finding that reasonable minds could not differ concerning the facts surrounding plaintiff's arrest by Barkeloo on May 30, 1973, and concerning Barkeloo and Smith's search of plaintiff's dwelling place on May 31, 1973, the Court directed a verdict for defendants concerning the arrest and the search. Since defendant Smith's only connection with this lawsuit concerned the May 31 search, he was dismissed as a party defendant. The propriety of these rulings is not before the Court on the present motions, so the Court will not dwell upon the grounds therefor in this opinion. Briefly stated, the Court directed a verdict concerning the arrest because the evidence showed that Barkeloo had reasonable cause to believe that plaintiff had violated the terms of his parole, see R.C. § 2967.15. The Court directed a verdict concerning the search of plaintiff's dwelling place because the evidence showed that plaintiff's grandmother, who owned the home in which plaintiff resided, had authority to consent to the search and that she in fact consented to it.

In view of the plaintiff's abandonment of his third and fourth causes of action, and in view of the Court's directed verdicts concerning the arrest and search, the only question verdicts concerning the arrest and search,

the only question remaining in the case concerned the failure to provide plaintiff a timely on-site preliminary hearing as required by *Morrissey v. Brewer*, 408 U.S. 471 (1972). As noted herein before, plaintiff was arrested as a parole violator on May 30, 1973, and was released twenty-seven (27) days later, on June 26, 1973.

Morrissey clearly requires that an on-site hearing be held

> as promptly as convenient after arrest while information is fresh and sources are available. Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.

408 U.S. at 485 (citations omitted). Mr. Wolfel never received such a hearing. Upon careful examination of the facts of the instant case, the Court determined as a matter of law that the Ohio Adult Parole Authority needed no more than ten (10) calendar days in which to hold an on-site hearing in Mr. Wolfel's case.[3] The Court therefore instructed the jury as follows:

> Plaintiff has alleged that he has been deprived of his liberty without due process of law. Specifically he claims that after his arrest by defendant Barkeloo and before the expiration of his 27-day confinement, he should have been given an on-site preliminary hearing.
>
> You are instructed that an on-site preliminary hearing means a hearing near the place of the arrest. A hearing given in Franklin County, Ohio, would have been an on-site hearing.

The constitutional right to due process of law demands that plaintiff should have been given such a hearing to determine whether there was probable cause to hold him for the final decision of the Parole Authority on revocation. This determination is to be made with notice to the parolee and to be made by someone not directly involved in the case, but could have been someone employed by the Adult Parole Authority.

Due process of law demands that the hearing should be held as promptly as convenient after arrest. The words 'as promptly as convenient after arrest' mean that the Parole Authority must, upon the arrest of a parolee for parole violation, move without undue delay to investigate whether a violation of parole has occurred, to assemble information, witnesses, and physical exhibits which are relevant to the determination of whether probable cause exists for revocation of parole, to schedule a preliminary hearing before a disinterested official, and to notify the parolee of the pending hearing.

The Court instructs you that a bond forfeiture does not remove the necessity of such a hearing as an essential element of due process of law.

I instruct you that as a matter of law plaintiff was denied due process of law in that he was not given a hearing to determine whether there was reasonable cause to hold him in confinement pending another hearing to determine whether he had violated the provisions of his parole. Further, I instruct you that under the non-conflicting facts of this case the hearing should have been held no

later than ten days from the date of his arrest, May 30, 1973.

If you find that the acts or failure to act of either or both of the defendants was the direct or proximate cause of the failure to provide plaintiff a hearing, it is then your duty to determine an amount that will compensate plaintiff for his damage resulting from his confinement from June 8, 1973. If you do not find, however, that the acts or failure to act of either defendant was the direct or proximate cause of the failure to provide plaintiff a hearing, you must find for defendants.

The jury returned a verdict for plaintiff and assessed his damages in the amount of one thousand dollars ($1,000.00).

Defendants contend, *inter alia*, that the Court erred in failing to charge the jury as to a "reasonable and good faith belief" defense. Defendants had asserted since the filing of their motion for summary judgment on September 30, 1974, [4] that they reasonably and in good faith believed that plaintiff's May 29, 1973, bond forfeiture on an intoxication charge was a "conviction" which eliminated the need for a *Morrissey* on-site hearing.

The "good faith and reasonable belief" defense to a §1983 claim has its origin in the following language of the Supreme Court in *Pierson v. Ray*, 386 U.S. 547, 555 (1967):

A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from

> doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.

More recently, in *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974), the Court stated as follows:

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

The defense, said by the United States Court of Appeals for the Fourth Circuit to be a "partly subjective" one, *Hill v. Rowland*, 474 F.2d 1374, 1377 (4th Cir. 1973), was recognized and approved by the Sixth Circuit in *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972). In *Jones* the Court of Appeals expressly approved the holding of the Second Circuit, on remand from the Supreme Court, that federal law enforcement officers may defend against suits for unlawful searches and seizures by alleging and proving that the officer

> acted in the manner complained of in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted.

Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1341 (2d Cir 1972). The defense is available to state officials in a 42 U.S.C. §1983 action. *Haines v. Kerner*,

492 F.2d 937 (7th Cir. 1974); *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974); *Williams v. Gould*, 486 F.2d 547 (9th Cir. 1973); *Daniels v. Van DeVenter*, 382 F.2d 29 (10th Cir. 1967); *Courtney v. School District No. 1*, 371 F. Supp. 401 (D. Wyo. 1974); *Bracey v. Rundle*, 368 F. Supp. 1186 (E.D. Pa. 1973); *Richardson v. Snow*, 340 F. Supp. 1261 (D. Md. 1972).

Defendant Sanborn testified at his deposition of October 21, 1974, as follows:

Q. [By Mr. Hutson] Now you had testified earlier that the arrest was initiated by the information you had as to the bond forfeiture on the intoxication charge. Was there any other basis or grounds for the arrest and detention of Mr. Wolfel?

A. [By Mr. Sanborn] Well, obviously the complaints concerning the firearm was of such serious nature that we wanted to make certain to check this out, ah, run a full investigation to determine if there was evidence enough to proceed with revocation on these terms.

* * * * * *

Q. What brought about the release of Mr. Wolfel on the or about the 26th of June, '73?

A. Okay. The release was brought about primarily because we had staffed the case; we did not want to pursue the firearms charges with the evidence that we had. We could not develop sufficient evidence at that time to pursue that; however, we could have pursued the intoxication charge and recommended a return solely upon that charge.

Q. But the . . . .

A. As our procedure relates, at that time, once a person posts bond, forfeits bond, is adjudicated guilty in that fashion, our case review section has thirty days in which to make a determination.

Q. You normally revoke parole based on a single incidence of intoxication, at least in the middle part of '73?

A. No, we do not--did not.

Q. So, what we're really talking about here is the concealed weapons charge, . . .

A. That's exactly right.

Q. . . . that's the primary concern.

A. That's exactly right. However, we felt that we were justified in terms of the bond forfeiture.

* * * * * *

Q. What do you mean by the testimony you were operating within a thirty day time frame?

A. Once probable cause has been established, by virtue of the fact that he posted bond, was found guilty by the court, by forfeiting that bond, our central office Case Review Section had thirty days within which to make a decision.

Q. Under the policy at that time, you could take the full thirty days even though the parolee was incarcerated?

A. That is correct.

Q. At that time the policy was that the bond forfeiture was sufficient to comply with whatever legal requirements you had?

A. That is correct.

Q. Okay. Is this still the policy?

A. No, it is not.

Q. Okay. You would now, if I am correct, have an actual hearing?

A. Right. We do not consider bond forfeitures at this time to mean a guilty plea or a court finding them guilty in absenteeism--absentee.

Q. Do you recall when this policy changed?

A. I'm not certain, but I think it was November, 1973.

* * * * * *

While the Court firmly adheres to its earlier opinion that a bond forfeiture is not a judicial determination of fact which suffices to supplant the need for a *Morrissey* on-site hearing, it would appear that if the defendants reasonably and in good faith relied upon a policy of the Ohio Adult Parole Authority in holding Mr. Wolfel without benefit of an on-site hearing, they may not be required to respond in damages under 42 U.S.C. §1983 for such unconstitutional action. Whether such a policy existed and whether the defendants reasonably and in good faith relied upon it are questions of fact which cannot be resolved by the Court on a motion for judgment notwithstanding the verdict.

For the reasons set forth hereinabove, it is hereby ORDERED that the judgment entered herein on January

8, 1975, be and it hereby is set aside. This matter will be scheduled for trial upon a future order of the Court.

Robert M. Duncan, Judge
United States District Court

[1]The Court has jurisdiction pursuant to 28 U.S.C. §1343(3).

[2]The third cause of action pertained to plaintiff's allegation that defendants Barkeloo and Smith had seized and appropriated for their own use during the search of plaintiff's dwelling place personal property belonging to plaintiff. The fourth cause of action alleged that defendant Barkeloo had "engaged in an unlawful course of conduct knowingly and maliciously calculated to deprive said Plaintiff his rights to a fair and impartial hearing before the Adult Parole Authority . . . ."

[3]*Cf.* Plaintiff's Exhibit 3, Parole Supervision Section Bulletin No. 13 (Amended) of the Ohio Adult Parole Authority at page 2: "The [on-site] hearing shall be scheduled to take place within ten working days after our official detainer is filed against the parolee."

[4]Such a defense is in the nature of an affirmative defense, see, *e.g.*, *Jones v. Perrigan*, 459 F.2d 81, 83 (6th Cir. 1972), and should therefore, as a technical matter, have been so pleaded. Fed. R. Civ. P. 8(c). Defendants' handwritten answer, filed on the morning of the first day of trial, was merely a general denial. Defendants had, however, placed plaintiff on notice of the defense with their motion for summary judgment, filed months before trial. Further, evidence was introduced at trial, without objection, as to this affirmative defense. See *Tillman v. National City Bank of New York*, 118 F.2d 631 (2d Cir. 1941); 2A Moore, Federal Practice at ¶8.25[3] (1974). The Court therefore treats the defense as having been properly pleaded in the answer. *Cf.* Fed. R. Civ. P. 15(b).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DENNIS M. WOLFEL
Plaintiff

vs.

Civil Action
No. C-2-74-126

NICK SANBORN, et. al.,
Defendants

JUDGMENT
Filed January 8, 1975

This action came on for trial before the Court and a jury, Honorable Robert M. Duncan District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff(s) DENNIS M. WOLFEL recover of the defendant(s) Nick Sanborn and John D. Barkeloo the sum of One Thousand ($1,000.00) dollars with interest thereon at the rate of six per cent (6%) as provided by law, and his costs of action.

Dated at Columbus, Ohio, January 8, 1975.

JOHN D. LYTER, CLERK

BY:
Deputy Clerk

DEFENDANTS' EXHIBIT C

STATE OF OHIO
DEPARTMENT OF REHABILITATION &
CORRECTION ADULT PAROLE AUTHORITY

PAROLE SUPERVISION SECTION BULLETIN NO. 13

TO: All Parole Officers and Administrative Staff

SUBJECT: On-Site Parole Violation Hearings

I. PURPOSE

As a result of the ruling on June 29, 1972 by the United States Supreme Court in the case of John J. Morrissey and G. Donald Booher, petitioners, vs. Lou B. Brewer, Warden, et al., the following procedures will be necessitated when a parole violation report is submitted.

II. POLICY

1) Except when the parolee has absconded and his whereabouts is unknown or when there has been a judicial determination by a court of probable cause (this includes preliminary hearing resulting in a bind over, Bill of Information, and Secret Indictment) or a violation of Ohio law or of a fact constituting a violation of parole, a hearing must be afforded the parolee at or near the site of the alleged violation of his parole.

2) The hearing shall be conducted by the Regional Supervisor, or a Unit Supervisor designated by him, and shall be scheduled to take place not longer than two weeks after submission of the parole violation report.

3) The parolee must be given written notice of the charges, time and place of the hearing, that its purpose is to determine whether there is probable cause to believe that he has committed a parole violation and that he has a right to bring letters, documents or individuals to the hearing who may have relevant information as to the issue of whether he has committed a parole violation. The parolee must also be informed that he has a right to question all witnesses, including the parole officer who has alleged the violations, and that he has a right to speak on his behalf.

4) At the request of the parolee, persons who have given adverse information upon which alleged violations are based are to be made available for questioning in his presence *provided, however, that if the hearing officer determines that the informant would be subject to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.*

5) The parolee should be advised that he does *not* have the right to be represented by counsel.

6) The parolee shall be presented with a waiver form so that he may waive his right to an on-site hearing if he so desires after fully being informed of his rights.

7) The location of the hearing shall include proper measures of safeguard and security and shall be convenient to the place where the alleged violator is being held.

8) Separation of all witnesses will strictly be adhered to in conducting the hearing.

9) The public will not be permitted to attend the hearing for matters of security and restriction to the hearing room location.

10) Following the hearing, the Regional Supervisor or Unit Supervisor conducting the hearing shall, within five (5) days, submit a report to the Superintendent of Parole Supervision advising whether, in his judgment there is probable cause to declare parole violation and to return the parolee to the institution for further determination by the Parole Board. This report shall state the reasons for the hearing officer's decision and indicate the evidence he relied upon.

11) If probable cause is found that the parolee is in violation of his parole and his return is imminent, he may voluntarily seek application for admittance and treatment in a Community Re-Integration Center. Admittance to the readjustment program will be determined by the Center Director, subject to review by the Superintendent's Office.

12) If the parolee is declared to be a parole violator and his return be authorized, the parolee shall be furnished information concerning his rights at the revocation hearing which will take place before the Parole Board.

III. PROCEDURE

1) The Unit Supervisor prior to submitting the parole violation report will carefully and closely review the alleged violations as presented by the supervising officer. He shall *make certain* that the reported or cited violations are corroborated. Violations must be substantiated by reliable and convincing evidence.

2) After the report has been submitted, *not later* than *ten* days after a hold order is filed, the Regional Supervisor, Case Supervisor, and Parole Officer will be notified if an on-site hearing shall take place.

3) Arrangements for the time and place of the hearing, notification of witnesses shall be completed by the Regional Supervisor or a Unit Supervisor designated by him. The original notification is to be directed to the witness with a copy for Central Office and a copy for the district file.

4) The alleged violator will be notified in writing of the nature of the charges using Form APA - PS - 13B by the Unit Supervisor and that a hearing is scheduled and of his rights in preparation for and during the hearing. These forms are to be prepared in triplicate. The original is to be given the parolee, one copy for Central Office, and one file copy.

5) The alleged violator has the right to waive the onsite or preliminary hearing. The Regional Supervisor or the designated Unit Supervisor, other than the Case Supervisor, will personally interview the allegec violator, fully apprise him

of his rights, and determine if he desires to waive the hearing. If it is determined that the alleged violator wishes to waive the hearing, Form APA - PS - 13A will be completed and properly signed by the violator and witnessed. This form will be completed in triplicate. The original is to be sent to Central Office and copies for the violator and district file.

6) If probable cause is found that the parolee is in violation of his parole and his return is authorized by the Adult Parole Authority, he is to be provided APA - PS - 13C notifying him of his revocation hearing and his rights. The form will be completed in triplicate. The original is given to the parole violator with copies for Central Office and the district file. If probable cause is found that the parolee is in violation of his parole, he may wish to apply for admittance to the Re-Integration Center. The violator will be provided with APA - PS - 13D. His application will be directed to the appropriate Re-Integration Center Director for processing if approved by the Superintendent of the Parole Supervision of the Parole Supervision Section.

George F. Denton, Chief
Adult Parole Authority

R.E. Giannetta, Superintendent
Parole Supervision Section

CROSS-EXAMINATION OF PETITIONER SANBORN

A. According to our policy in effect at that time, the case review section, which is an administrative body in our central office, reviews all arrest violations, looks at the evidence and makes a determination in terms of whether an on site hearing is to be held and, at that point in time, they either assign the regional supervisor or the unit supervisor to hold hearings.

Q. You couldn't have initiated it?

A. No, sir, not under that procedure.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 10 1982
ALEXANDER L. STEVAS

No. 81-1580

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NICK SANBORN, et ano.,
Petitioners,

-vs-

DENNIS M. WOLFEL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial judge, in a suit under 42 U.S.C. §1983 for depriving the plaintiff of liberty without due process of law, committed reversible error by instructing the jury that the defendants had the burden to prove that they acted in good faith.

2. Whether there was sufficient evidence to support a jury verdict concluding that defendants, acting under color of state law, deprived plaintiff of liberty without due process of law and acted in either subjective or objective bad faith.

3. Whether the evidence supported a jury verdict awarding $1000 in compensatory damages for twenty seven days of unlawful confinement.

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OPINIONS BELOW

The opinion of the court of appeals which petitioners seek to have this court review is reported at 666 F.2d 1005 (6th Cir. 1981). It is attached to the petition at A-8, and the court of appeals' order on rehearing is at A-6. The earlier opinion of the court of appeals in this case is at 555 F.2d 586 (6th Cir. 1977). It is at A-37.

STATEMENT OF THE CASE

A. THE FACTS

Respondent disagrees in many respects with petitioners' fact statement. Rather than restating the facts, respondent requests the court to examine the fact statement set out in the first opinion of the court of appeals, starting at A-38. Although the case is on review of a retrial after remand, the facts are essentially the same as reported in the first opinion, and the court of appeals, in the opinion on review, specifically referred the reader to its earlier opinion for the facts. Several very important facts, which are not mentioned by petitioners, will be discussed in part one of respondent's argument.

B. PROCEEDINGS BELOW

This case first went to trial before District Judge Robert M. Duncan and a jury in Columbus, Ohio in 1975. After the jury awarded respondent $1000, Judge Duncan, who had not instructed the jury on qualified immunity, initially concluded that he had been wrong in denying the instruction and granted a new trial. A-76. He then reconsidered in response to petitioners' summary judgment motion and reinstated the verdict. A-58. Respondents argued to the court of appeals that they were entitled to have the jury instructed on subjective and objective good faith, and the court of appeals agreed. In its first opinion, remanding for a new trial, the court of appeals went to some length in examining the evidence to demonstrate that there was enough for a jury question on both sub-

jective and objective good faith.

At the second trial, Judge Duncan instructed the jury on subjective and objective good faith. The second jury also returned a $1000 verdict for respondent. Following Judge Duncan's denial of petitioners' post-trial motions, A-22, they again appealed, this time arguing that the evidence was such as to require judgment as a matter of law on qualified immunity and, for the first time, that they were entitled to a jury instruction that the burden of proof on subjective and objective good faith was on the plaintiff. In the opinion on review, the court of appeals addresses both issues.

SUMMARY OF ARGUMENT

There is no conflict between the decision below and that of any other court of appeals. In fact, it is the only decision on the proper jury instruction to be given on burden of proof in cases under 42 U.S.C. §1983 since this court's decision in Gomez v. Toledo, 446 U.S. 635 (1980), which deals with the analogous issue of burden of pleading. Moreover, the challenge to the jury instruction was not properly preserved in the trial court.

The second and third questions presented are nothing more than efforts to have this court reexamine facts examined by the court of appeals and the district court not once, but twice, since the opinion sought to be reviewed was on appeal after a remand. Both times, different juries reached the same conclusion.

ARGUMENT

I. THE FIRST QUESTION PRESENTED

A. INTER-CIRCUIT CONFLICT

Petitioners contend that the decision below conflicts with pertinent decisions of other circuits. It is not so.

In Gomez v. Toledo, 446 U.S. 635 (1980), this court unanimously held that the burden of pleading on the subject of the qualified immunity in suits under 42 U.S.C. §1983 was on the defendant. In a short postscript, Mr. Justice Rehnquist noted that he read the opinion as leaving open the issue of the burden of persuasion, as opposed to the burden of pleading. In addition to recognizing a difference between the burden of pleading and the burden of persuasion, the law recognizes a difference between the burden of producing evidence and the instruction to be given to a jury on who

has the burden of proof.[1/] The latter is often referred to as the burden of persuasion.

The issue which was presented to the court of appeals and on which it wrote in this case was whether it was error to instruct a jury that the defendant has the burden of proof on the qualified immunity.[2/] A-9-A-10. In preparing this brief, counsel for respondent has examined every reported post - Gomez court of appeals opinion citing Gomez, and the court of appeals' opinion in this case is the only reported post - Gomez decision discussing this issue. Pre Gomez

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1 / Compare Mullaney v. Wilbur, 421 U.S. 684 (1975) with Ulster County Court v. Allen, 442 U.S. 140 (1979). See generally Sandstrom v. Montana, 442 U.S. 510 (1979).

2 / "We conclude that the district court correctly instructed the jury that it was the burden of the two parole officers to prove their defense of qualified immunity."

decisions are really not in point, because Gomez gave structure to this narrow area.

There are several post - Gomez decisions which consider the burden of producing evidence. The trend of those cases seems to be that the defendant has the burden of producing evidence. See, e.g., Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir. 1981); Henrickson v. Bentley, 644 F.2d 852, 856 (10th Cir. 1981); Barrett v. Thomas, 641 F.2d 1193, 1201 (5th Cir. 1981). Three cases appear to hold that, when it is uncontested that a defendant was acting within the scope of his authority, the burden of producing evidence shifts to the plaintiff. The first of these was Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980). Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981), which respondents contend to be in con-

flict with this case, merely continues the Douthit rule for the Fifth Circuit. The third of the cases is Jihaad v. O'Brien, 645 F.2d 556 (6th Cir. 1981), which appears to adopt the Douthit - Barker rule for the Sixth Circuit. Two of the three judges of the Sixth Circuit who decided this case were on the Jihaad panel and, as Judge Phillips explained in the opinion on review, they saw no conflict between the Jihaad decision and this one. A-10-A-11. In this case, petitioners sought en banc rehearing based on Jihaad, and the Sixth Circuit denied it.

The rest of the cases cited by Petitioners as establishing an inter - circuit conflict are pre - Gomez. Pet. p. 8-9. Not one of them involves the issue of what the jury should be told on the burden of proof. Since this is the

only case on point, then, the court should carefully consider Mr. Justice Stevens' recent suggestion that "[o]ften the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts." Vasquez v. United States, ___ U.S. ___, 102 S.Ct. 528 (1981)(opinion respecting the denial of the petition for writ of certiorari).

B. THE RECORD

Although the court of appeals addressed the jury instruction issue, in fact it was not even properly preserved. At trial, counsel for petitioners gave Judge Duncan three unnumbered proposed jury instructions. Among them was the following instruction:

> In order to prove his claim, the burden is on the plaintiff to establish by a preponderence

> of the evidence in this case that these defendants knowingly denied him of his right to a preliminary on-site hearing; and that they did so with the malicious intention of depriving the plaintiff of his constitutional rights.
>
> If you find that the actions of these defendants was in accord with their departmental policies which they reasonably believed to be proper, you must find for the defendants.

During the trial, Judge Duncan circulated typewritten jury instructions and asked each party to indicate what changes, if any, were desired. Counsel for petitioners raised several points, but did not mention the allocation of the burden of proof on the qualified immunity. Judge Duncan's typewritten instruction on the point, which the parties had before them, said,

> To establish this defense, the defendants must convince

> you by a preponderence of the evidence that they actually believed they were not required to accord Mr. Wolfel an on-site hearing, and that this belief was reasonable in light of the circumstances. If defendants did so convince you, then you must find for the defendants in this matter.

Although petitioners' counsel asked Judge Duncan to give their instruction, they never objected to the instruction on allocation of burden of proof.

Rule 51, F.R.Civ.P. provides:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection.

Our view that the record was not properly preserved is more than a technicality. Comparison of petitioners' proposed instruction and Judge Duncan's reveals that they are in disagreement both

on the burden of proof and on the phrasing of the substantive test for qualified immunity. On the latter score, requiring a "malicious intention of depriving the plaintiff of his constitutional rights" was clearly not in accord with the standard established by this court in Scheuer v. Rhodes, 416 U.S. 232 (1974) and Wood v. Strickland, 420 U.S. 308 (1975), and Judge Duncan had every reason to deny it on that ground. Either an objection or at least a specific statement on the point by the defense attorneys was necessary to inform Judge Duncan that they separately disagreed with his allocation of the burden of proof, but the record reveals neither.

II. THE SECOND QUESTION PRESENTED

The second issue involves the application of general rules on sufficiency of evidence to the facts of this case. The court of appeals' statement of the rule of law on reviewing sufficiency of evidence claims is a correct one, A-11, and we do not understand petitioners to be arguing that the rule applied in this case conflicts with that applied elsewhere. Rather, they are asking this court to re-evaluate the sufficiency of the evidence. Given the facts that the Sixth Circuit did so twice in this case and Judge Duncan did so several times more, A-22, A-34, A-59, it is certainly not a useful allocation of this busy court's time for it to do so as well. See Wilkerson v. McCarthy, 336 U.S. 53, 66-68 (1949)(concurring opinion of Mr. Justice Frankfurter).

Moreover, there was more than ample basis in the record for the jury to have concluded that there was subjective or objective bad faith or both. Petitioners believed that respondent, a parolee, had brandished a gun at somebody, but they had no real evidence on which to base a formal charge, since the complainant refused to sign a charge. They had respondent held in jail for 27 days while they investigated and only after his release raised the claim that they were entitled to do so because he had been arrested for being intoxicated and had forfeited bail. At trial, both petitioners admitted that the latter point was a mere pretext to hold respondent while the gun charge was investigated. Part of the testimony is quoted in Judge Duncan's opinion denying judgment non obstante veredicto after the second

trial. A-27 - A-28.

At trial, petitioners relied on the existence of a policy regarding bond forfeitures. See A-90. The written policy, however, says nothing of whether a bond forfeiture for public intoxication would serve as a conviction for a crime which would justify a probable cause determination without an on-site hearing. As a result, petitioners had to rely on their testimony that there was an unwritten policy to treat bond forfeitures as criminal convictions. Petitioner Sanborn testified at trial that he got his understanding of the policy from a discussion with Assistant Attorney General Conway at a meeting held at the Columbus Racquet Club at which respondent's case was specifically discussed. At trial, however, Colonel Conway testified that, while he believed that a bond forfeiture

supplied probable cause to justify an on-site decision to incarcerate a parolee, he had not personally informed either petitioner of such a policy, that it had not been discussed at the Columbus Racquet Club meeting and that he had had no personal involvement in respondent's case. Tr. Oct. 12, 1978 (afternoon), p.8-11.

As a result, there was ample evidence to support a jury's decision to disbelieve petitioners and, even believing them, to use their own pretext admissions to find that they had not acted in good faith.

III. THE THIRD QUESTION PRESENTED

Petitioners contend that an award of $1000 for 27 days of incarceration conflicts with the decision of this court in Carey v. Piphus, 435 U.S. 247 (1978) on availability of compensatory damages for civil rights violations. This claim was made to the court of appeals, and the majority, though writing on the merits, thought it sufficiently weak to dismiss without comment. A-12. Even Judge Weick, who strenuously dissented on the facts, A-12 - A-19, did not think this point worth commenting on.

Carey v. Piphus, 435 U.S. 247 (1978) was cited and discussed in the briefs for appellants and appellee in the court of appeals, so the judges were certainly aware of it. There is no reason to believe they intended, sub silentio, to

disregard it.[3/] Rather, the damage question involved a simple application of the Carey rule to the facts of this case and certainly does not require additional consideration here.

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3 / The pertinent part of the jury charge squares with Carey and was not objected to.

CONCLUSION

The petition should be denied.

Respectfully Submitted,

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Petitioner's Reply Brief

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CASE NO. 81–1580

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

NICK SANBORN, *et al.*,
Petitioners,

v.

DENNIS M. WOLFEL,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondent, in his opposing brief, makes several statements which are incorrect and could be misleading.

Respondent does not dispute that, at the time in question, it was the policy of the Ohio Adult Parole Authority to consider a bond forfeiture on a criminal charge as prima facie evidence of a parole violation which would eliminate the need for an on-site hearing. Respondent states, however, that the claim of the policy was not raised until after respondent's release from custody. That is incorrect.

The parole violation report (App. A - 1 to A - 3) prepared June 12, 1973, nine working days after respondent was arrested, shows that petitioners at the time believed that the bond forfeiture eliminated the need for an on-site hearing,

Mr. Sanborn, the deputy superintendent, testified, on cross-examination, that in respondent's case he had requested the Attorney General to review the policy. (App. B - 4). This was confirmed by Mr. Conway, an assistant attorney general. (App. C - 5).

Respondent's statement that petitioners held respondent in jail for twenty-seven days until they investigated the charge, in also misleading. The investigation was completed in twelve working days. The following working day, when petitioner Sanborn concurred in the recommendation that respondent be released on parole, petitioners had done everything within their power to protect the interests of respondent.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Reply Brief of Petitioners was sent on this 24th day of March, 1982 by United States first class mail, postage prepaid, to Michael E. Geltner, Geltner & Ritchie, Number Ten E Street, S. E. Washington, D. C. 20003, Attorney for Respondent.

THOMAS V. MARTIN

Exhibit

DEFENDANTS' EXHIBIT A

Ohio Penitentiary
(Institution)

State of Ohio
ADULT PAROLE AUTHORITY
1050 FREEWAY DRIVE NORTH
Columbus, Ohio 43229

FU: 6-22-73

Nature of Report: Arrest & Arrest Supplement
Date: June 12, 1973
Parolee: Dennis M. Wolfel
No. (Institution) 135-859 White White Colored
Post Office Address Confined: Franklin County Jail
Employed by: Unemployed Address
Admitted: 5-11-69
From (County): Franklin
Crime & Sentence: B&E n/s (1 – 15 yrs.)
Paroled: 3-15-73

Please be advised that on May 29, 1973 one Gladys Marie Kuhn appeared at this office and filed a statement concerning subject, wherein she indicated that the subject on or about May 25, 1973 threatened her and one Sharon Wiggins. She further stated that the subject was carrying a firearm. (See attached copy of above caption statement) As a result of this statement, this officer, assisted by Officer Kroesch, did on May 31, 1973 take subject into custody for investigation purposes and incarcerated him in the Franklin County Jail.

On or about May 26, 1973, subject was arrested on the charge of Public Intoxication at the Tip Top Lounge, 2296 Westerville Road and taken into custody by the Columbus Police Department. Subject at that time posted a $30 bond and he forfeited it on May 29, when he failed to appear in court to answer said charge. (Municipal Court Case No. 17663) Further, at or about 5:00 a.m. on May 26, 1973, Ms. Kuhn filed a Warrant for Trespassing against subject; (Municipal Court Case No. 17834) then on or about May 28, 1973, Ms. Kuhn filed a charge of Telephone Harassment against subject as a result of a telephone call she received at about 10:00 p.m. May 27, 1973, when someone believed to be the subject, told her "I am coming after you, you don't have much time left, it is all over for you."

As a result of the bond forfeiture on the Intoxication charge, which is a violation of the subject's Conditions of Parole, we believe we are justified in continuing to hold the subject under a parole detainer until such time as we can schedule a Polygraph Examination to determine the subject's probable guilt or innocence on the above noted firearm charge. Said examination is tentatively scheduled for June 18, 1973 at 1:00 p.m.

A Parole Violation report will follow forthwith indicating that the subject has violated his parole in the following manner:

Violation of the law. To Wit: Being found guilty of Public Intoxication, a misdemeanor, and allegedly violating his parole by comitting Trespassing and Telephone Harassment and Possessing a Firearm.

/s/ Nick J. Sanborn
N.J. Sanborn, Supervisor

/s/ John D. Barkelco
John D. Barkelco
Parole Officer

JDP/cc d. 6/9
cc: Offr. Barkelco
File

(Clerk Stamp Deleted)

Q. Mr. Harris, did you testify that in this case here, in my case, that you sought personal verification from the Attorney General's Office on this bond forfeiture policy?

A. I testified that - - or you can testify, whichever is the same - - in this particular case, I did ask for clarification.

In this particular case, I asked Mr. Tom Rooney, who worked for Mr. Leo Conway. After their conference, they assured me that it was.

A. A query was made from the Adult parole Authority concerning this question, as to whether or not a bond forfeiture would constitute probable cause to obviate the necessity of having an on-site hearing. That question was not presented to me. It was presented to one of my assistants and after due consideration and discussion in the office he answered the question, to whom I don't know; but subsequently I did specifically talk to Ray Gionetto, who was the Superintendent of Parole Supervision at that time and I told him it was my opinion.